Supreme Court, U.S.
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In The

Supreme Court of the United States

ALEXANDER VALENTINE,

Petitioner,

v.

EDWARD S. ALAMEIDA, JR., et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENE G. IREDALE
Counsel of Record
105 West "F" Street, Fourth Floor
San Diego, California 92101
(619) 233-1525

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Fifth Amendment forbid the use of post-arrest, pre-*Miranda* silence of an accused as substantive proof of guilt in the prosecution's case-in-chief?

2. Does the Sixth Amendment right of confrontation provide an accused the right to cross-examine the witness who conducts complex DNA tests, as opposed to the "reader" of the test results who neither conducted nor witnessed any of the tests?

PARTIES TO THE PROCEEDINGS

In the Court of Appeals, Mr. Valentine was the appellee and cross-appellant; respondent Edward S. Alameida, Jr., was the respondent-appellant, cross-appellee.

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PETITION FOR A WRIT OF CERTIORARI

Alexander Valentine respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals issued an unreported decision. (App. 1-5) The District Court's opinion (App. 6-48) and the Magistrate Judge's report and recommendation (App. 50-182) are included in the appendix.

JURISDICTION

The Court of Appeals issued its decision on August 8, 2005. After a timely petition for rehearing and rehearing *en banc*, the Court of Appeals deleted one sentence of its decision and denied rehearing on September 20, 2005. (App. 183-184) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the Constitution provides in relevant part that "In all criminal prosecutions, the

accused sh[illegible]njoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This petition seeks review of the Court of Appeals decision reversing the district court's grant of *habeas* relief to Alexander Valentine. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253 and 2254.

The case presents two issues of Constitutional significance. The state argued at trial that Alexander Valentine's silence after a detective told him he was under arrest for murder was substantive evidence of his guilt of the crime. This use of post-arrest, pre-*Miranda* silence, not for impeachment of an accused's testimony but as substantive proof of guilt, is in violation of the Fifth Amendment, the clear precedents of this Court, and the overwhelming weight of lower federal court authority.

Second, the state called as a witness as "reader" of the report of the DNA analyst who tested the blood evidence. Under the rubric of the "business records" exception to the hearsay rule, the state placed before the jury the results of complex DNA tests. The "reader" had neither conducted nor witnessed any of the DNA tests, which depend upon the analyst's scrupulous adherence to detailed protocols for reliability. The use of the business records exception to evade cross-examination of the analyst, whose competence, adherence to protocol and actual findings were at issue, violated Mr. Valentine's Sixth Amendment right to confrontation.

On September 26, 1996, the San Diego, California District Attorney's Office filed an information charging Alexander Valentine with the murders of his mother and father, Diane and Kenneth Valentine. On December 16, 1996, a jury found Alex Valentine guilty of the second degree murder of Diane Valentine and the first degree murder of Kenneth Valentine. On February 24, 1997, the state court sentenced Alex Valentine to life in prison without the possibility of parole.

On January 10, 2000, the Court of Appeal, Fourth Appellate District, Division One, filed an unpublished opinion affirming petitioner's convictions. On April 19, 2000, the California Supreme Court denied his petition for review.

Mr. Valentine filed a petition for a writ of *habeas corpus* in the U.S. District Court for the Southern District of California on April 18, 2001. On July 9, 2003, the magistrate judge filed a report and recommendation that the petition be granted. On January 7, 2004, U.S. District Court Judge Napoleon A. Jones, Jr. issued an order conditionally granting the petition. The Court of Appeals reversed the grant of *habeas* relief.

In 1996, Alexander Valentine was a 19 year old college student, who had no previous criminal record or history of violence. Witnesses testified that Alex had a normal relationship with his parents Diane and Kenneth Valentine. Despite this, he was convicted of the murders of both his parents. The prosecution theory was that he murdered his parents because he was afraid to tell them that he had failed his first year of college. The state's case relied on Alex Valentine's silence after his being told that he was under arrest; an unrecorded alleged confession to the

police after he had invoked his right to counsel; and traces of blood evidence found in the family home and in one of the family pickup trucks.

Alex Valentine defended with evidence that he had a loving relationship with his parents. (App. 53) There was no sign of difficulties between them on the day of the homicides and he was seen leaving the business, where the murders took place, before they occurred. Petitioner also offered evidence that another man, an aggrieved associate about whom his mother Diane had expressed fears the day of her death, was the likely killer. (App. 63-64) He maintained that the confession was fabricated by the police and provided an alternative explanation for the prosecutor's DNA evidence. (App. 62-63) The district court found three constitutional violations, the cumulative impact of which undermined the reliability of the jury's verdict. (App. 47-48)

Diane Valentine owned a water purification business, Environmental Management, in San Diego, which sold water filters and distributed purification equipment for the Oregon based Landa Corporation. (App. 53) Kenneth Valentine worked for Science Applications International Corporation (SAIC) in San Diego as an engineer and scientist. *Id.*

August 2, 1996, was a Friday. (App. 54) Diane Valentine and her husband, Kenneth, planned to go to dinner after work that evening. *Id.* Both were found bludgeoned to death at Diane's business by Michael Sylvester, the United Parcel Service delivery man, who also served as Diane's nighttime office janitor. (App. 55)

After investigating the crime scene, officers ran the vehicle registration records and discovered the Valentine home address – 4080 Arroyo Sorrento Road. *Id.* Police then went to the Valentine home. (App. 56)

Because the phone to the house was unlisted and the number could not be determined, the officers, with the aid of the telephone company, established a temporary phone number to the residence and at 4:43 a.m., Sergeant Campa used it to call the residence. (App. 56-57) Alex answered the phone and identified himself. (App. 57) Campa asked him to come outside because they needed to talk to him, and Alex responded he would be out as soon as he put his clothes on. *Id.*

The police handcuffed him and placed him in the back seat of Officer Kevin McNamara's patrol car. *Id.* Detective. Verduzco heard him say, "What's the problem? What's the problem? I called you. My mom and dad have not come home yet." *Id.* While sitting in the rear of the patrol car, petitioner asked Officer McNamara what was going on. *Id.* He said that his parents had gone out for his mother's birthday. *Id.* They had not come home, and he was worried about them.

Detective Donaldson approached Mr. Valentine in the car and told him he was under arrest for murder. *Id.* Alex Valentine did not respond. *Id.*

At trial, in the state case-in-chief, on direct examination of Detective Donaldson, the prosecutor elicited testimony regarding Alex's silence after Donaldson informed him that he was under arrest for murder.

> Q. What did you tell the defendant at that time?
>
> A. I told him he was under arrest for murder.
>
> Q. When you told him that he was under arrest for murder, did you tell him the number of victims?

A. No.

Q. Did you tell him the names of the victims?

A. No.

Q. When you told the defendant that he was under arrest for murder, did he respond?

A. Not at all.

Q. He didn't ask whose murder he was being placed under arrest for or why?

MR. IREDALE: Objection as to relevance, Fifth and Sixth Amendments.

MS. BLAIR: Your Honor, this is –

THE COURT: It's a leading question to boot. Sustained on that ground, at least.

MS. BLAIR: Your Honor, I think we need to be heard at sidebar.

THE COURT: I don't need to be heard. Just proceed with your next question.

MS. BLAIR: Thank you.

Q. He said nothing at all, no response at all to that?

MR. IREDALE: Objection as to relevance, Fifth and Sixth Amendments.

THE COURT: Overruled.

THE WITNESS: He said nothing. (App. 68-69)

The prosecutor later elicited testimony from Officer McNamara during the case-in-chief about Alex Valentine's silence following his arrest by Donaldson:

Q. What did you hear the detective say?

A. "You're under arrest for murder."

Q. Did the detective say the number of murders or who was murdered?

A. No, ma'am.

Q. Did the defendant respond at all when he was told he was under arrest for murder by this detective?

A. No, ma'am. (App. 70)

On McNamara's redirect examination, the prosecutor reiterated the testimony:

Q. When you heard Detective Donaldson tell the defendant "You're under arrest for murder," he didn't say anything, did he?

A. No.

Q. Nothing at all?

A. No.

During his defense, Alex Valentine testified about the events of the night of his arrest, including the facts surrounding the arrest itself. The prosecutor asked no questions on cross-examination on this issue, nor did the prosecutor introduce any later conflicting or rebuttal evidence. In closing argument, the prosecutor argued to the jury that Alex Valentine's silence after being informed that he was under arrest for murder was substantive evidence of his guilt:

When the defendant was placed under arrest for the murders of his parents, why no questions, no protest? Because he already knew. He knew why

> they were there. Can you imagine? You're under arrest for murder. No comment whatsoever? No protest? No, "What the hell?" No, "Who was murdered?" No, nothing. He already knew the answer . . . .
>
> It just happens that when he's placed under arrest for murder, he says nothing, nothing. "You're under arrest for murder." Silence . . . He's not asking, "Why am I placed under arrest for murder?" because he knows. He knows why they're there. He just doesn't know how they found out and what they know and he's going to be careful. That evidence is consistent with a guilty person. Can you imagine, if I told you were placed under arrest for murder, and you don't ask questions? (App. 70-71)

Defense counsel moved for a mistrial based on the prosecutor's argument that silence after arrest is evidence of guilt. (App. 71) On appeal, the state court concluded that, because Alex Valentine's silence occurred before the arresting officers had advised him of his *Miranda* rights, there was no error:

> Although it is an established principle of constitutional law that once an accused has been admonished pursuant to *Miranda*, his or her silence may not be used to impeach an explanation subsequently offered at trial (*Doyle v. Ohio*, 426 U.S. 610, 617-618 (1976)), this rule of exclusion does not apply if the *Miranda* admonishment has not been given. (*Fletcher v. Weir*, (1982) 455 U.S. 603, 605-607; see also (*People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 244-245 [after Prop. 8, *Doyle* rule applies only to post-*Miranda* silence].) Since Valentine had not been Mirandized when Donaldson told him he was

> under arrest, *Doyle* did not apply. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842 ["It is thus clear that where *Miranda* warnings have not been given, the federal rule, as announced in *Fletcher v. Weir*, governs, and *Doyle* error is not committed by questions or commentary concerning a defendant's post-arrest silence."].) (App. 71-72)

Thus the state appellate court relied on *Fletcher v. Weir*, 455 U.S. 603 (1982) to provide the rule of its decision that the Fifth Amendment did not forbid the use of post-arrest silence as substantive evidence of guilt.

After raising and exhausting the federal constitutional issues in the state trial and appellate courts, Mr. Valentine filed a petition for writ of *habeas corpus* in the U.S. District Court for the Southern District of California. The district court found that the state trial judge committed constitutional error in permitting the prosecution to use Mr. Valentine's post-arrest silence as substantive evidence of guilt in its case-in-chief. (App. 20, 71-80)

The district court ruled that the Fifth Amendment error was compounded by the state trial court's decision to give an "adoptive admissions" instruction to the jury pertaining to petitioner's silence in the face of Donaldson's statement, "You are under arrest for murder." (App. 81-83) The trial court had given *California Criminal Jury Instruction* § 2.71.5, which told the jury that they could consider Valentine's failure to deny the officer's "accusation" of murder at the time of his arrest as substantive evidence of guilt:

> If you should find from the evidence that there was an occasion when the defendant (1) under

> conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial or made false, evasive or contradictory statements, in the face of an accusation, expressed directly to him or in his presence, charging him with its commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true . . . (App. 81)

In its ruling on the *habeas* petition, the district court found that the state court ruling was an unreasonable application of clearly established law. (App. 15-19) The district court ruled that the state court had applied the wrong body of Supreme Court law in its ruling. (App. 18) The applicable principle is not found in *Fletcher v. Weir*, but in *Griffin v. California* and in *Miranda v. Arizona* itself. (App. 17-18)

The district court also found that the admission of trial testimony by a witness who had witnessed none of the critical DNA tests to which she testified was a violation of the Confrontation Clause of the Sixth Amendment.

The district court concluded that the state court's evidentiary ruling admitting Cellmark's DNA tests as business records was unreasonable because it insulated these highly sensitive, scientific tests from proper cross-examination about the accuracy and reliability of the testing procedures, thereby violating Mr. Valentine's Sixth Amendment right to confrontation. Because Cellmark's DNA tests were central and compelling pieces of evidence, the error rendered petitioner's trial "so fundamentally unfair as to violate due process." The district court found

that these two errors, together with an improper preclusion of cross-examination of the detective regarding Mr. Valentine's alleged confession, had the cumulative effect of denying Mr. Valentine a constitutionally fair trial. (App. 36-39)

The Court of Appeals for the Ninth Circuit reversed the district court's grant of relief, holding that because petitioner testified at his trial, albeit after evidence of silence was introduced in the prosecution's case, the state court decision was not contrary to clearly-established Supreme Court law, and there was no Confrontation Clause violation because the DNA test results were "business records." (App. 2-4)

REASONS FOR GRANTING THE PETITION

THE FIFTH AMENDMENT AND THIS COURT'S PRECEDENTS CLEARLY BAR THE USE OF AN ACCUSED'S SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT IN THE PROSECUTION CASE IN CHIEF

The Court of Appeals erred in finding that there was no clearly established law forbidding the prosecution's use of post-arrest, pre-*Miranda* silence as substantive proof of guilt. The decision also errs in its analysis of the facts. The decision notes:

> Although Valentine's silence was first introduced prior to his taking the stand, Valentine took the stand and presented testimony that he was silent when told he was under arrest for murder. Because Valentine testified to his silence, neither

> *Doyle* nor *Fletcher* clearly applies to these facts. (App. 2-3)

Mr. Valentine's reference to evidence of silence ***after its admission*** cannot retroactively validate the erroneous admission. Had it not been erroneously admitted, Mr. Valentine would not have needed to address the issue at all. Mr. Valentine's direct testimony regarding the arrest and his silence was not followed by any prosecution cross-examination on the issue, nor by any attempt to impeach any aspect of his testimony by post-arrest, pre-*Miranda* silence. The prosecution obtained an "adoptive admissions" instruction from the trial court and argued in closing that Mr. Valentine's post-arrest pre-*Miranda* silence was ***substantive evidence of guilt***. The prosecutor used this instruction to argue that the operative words used to effect the arrest itself ("You are under arrest for murder") constituted an accusation which, under the instruction, required denial. The prosecutor never argued that the silence impeached or discredited Mr. Valentine's trial testimony; she argued that the silence was proof of guilt *simpliciter*:

> When the defendant was placed under arrest for the murders of his parents, why no questions, no protest? Because he already knew. He knew why they were there. Can you imagine? You're under arrest for murder. No comment whatsoever? No protest? No, "What the hell?" No, "Who was murdered?" No, nothing. He already knew the answer. . . . (App. 70-71)

> It just happens that when he's placed under arrest for murder, he says nothing, nothing. "You're under arrest for murder." Silence . . . He's not asking, "Why am I placed under arrest for

> murder?" because he knows. He knows why they're there. He just doesn't know how they found out and what they know and he's going to be careful. That evidence is consistent with a guilty person. Can you imagine, if I told you were placed under arrest for murder, and you don't ask questions? (*Id.*)

The state espouses the principle that any person placed under arrest for a crime must immediately protest his innocence on pain of having silence introduced at trial as direct proof of guilt. It is wrong to allow an inference of guilt from a silent submission to the arresting authorities. It is wrong because it compels the accused arrestee to speak on pain that an election not to speak will be used as evidence of guilt.

By treating the operative words of arrest, "You are under arrest for murder," as an accusation, and the accused's silence as an admission, the state converts silence into a statement: "Yes, I am guilty." Its theory holds a fatal contradiction: if the words "You are under arrest for murder" should reasonably trigger a response or denial, then the statement of arrest constitutes interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980). The silence of the accused becomes equivalent to the response, "Yes, I am guilty," under the state's theory – and therefore, absent the giving of *Miranda* warnings, the response must be suppressed. By treating the arrest itself as an accusation, and silence as an admission, the state effectively evades the requirement that custodial interrogation be preceeded by *Miranda* warnings.

Forty years ago, in *Griffin v. California*, 380 U.S. 609 (1965), this Court held that the Fifth Amendment forbids both comment by the prosecution on the accused's silence and instruction by the court that such silence is evidence

of guilt. *Griffin* held that prosecutorial comment on a defendant's silence is a remnant of the inquisatorial system of justice, which the Fifth Amendment outlaws. It is a penalty imposed for exercising a Constitutional privilege. "It cuts down on the privilege by making its assertion costly." *Id.* at 614.

Thirty-nine years ago, this Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966) that:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. ***The prosecution may not therefore use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*** *Cf., Griffin v. State of California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) . . . 384 U.S. 609 at 669, n.37. (emphasis added).

The right to remain silent carries an "implicit assurance" that silence will carry no penalty. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Although *Miranda* warnings are required to reduce the inherent coerciveness of custodial interrogation, *New York v. Quarles*, 467 U.S. 649, 654 (1984), the warnings are a prophylactic means of safeguarding Fifth Amendment rights – they are not themselves the source of those rights. Once the government places a person under arrest, that person may remain silent in response to any accusation. *Mitchell v. United States*, 526 U.S. 314, 338 n.2 (1999) (Scalia, J., dissenting) (noting that the Supreme Court did say in *Miranda v. Arizona* that "a defendant's post-arrest silence could not be introduced as substantive evidence against him at trial.").

In *United States v. Hale*, this Court noted that silence at the time of arrest inherently ambiguous ***apart*** from the effect of *Miranda* warnings. *Hale*, 422 U.S. 171, 177 (1975). Silence at the time of arrest is of dubious probative value. *Doyle*, *supra*, at 618, n.8. The state in *Doyle* never suggested that silence itself could be used as evidence of guilt, but only sought to use silence for the limited purpose of impeachment, basing its claim on cases in which the Court permitted use for impeachment purposes of post-arrest statements that were inadmissible as evidence of guilt because of an officer's failure to follow *Miranda*'s requirements. *Id.* at 617.

Cases such as *Harris v. New York*, 401 U.S. 222 (1971) and *Oregon v. Haas* 420 U.S. 714 (1975) permit the use for impeachment of statements that were excluded from the prosecution's case-in-chief. The rationale of *Harris* and *Haas* is simple and fair: the accused may not convert *Miranda*'s constitutional shield into a testimonial sword with which to commit perjury. In such a case, and only to impeach, not to use as substantive evidence of guilt, has the Court permitted the use of evidence obtained in violation of *Miranda*. See also *Walder v. United States*, 347 U.S. 62 (1954).

The same rationale is present throughout the Court's jurisprudence on the admissibility of an accused's silence as evidence at trial. Such silence, like the suppressed statements in *Harris* and *Haas*, is admissible to ***impeach*** a defendant's trial testimony, but not for the substantive purpose of proving guilt. Like statements taken in violation of *Miranda*, pre-*Miranda* silence may be admitted on cross-examination of the accused if it is probative of the falsity of his proffered testimony. Like the statements in *Haas* and *Harris*, the rationale is the same: to prevent the

exploitation of a Constitutional protection to commit perjury. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

In *Fletcher v. Weir*, 455 U.S. 603, 607 (1982), the Court permitted the use *for impeachment* of the post-arrest silence of the defendant, when no *Miranda* warnings had preceded the silence. The Court ruled that cross-examination of an accused who chooses to take the stand by post-arrest pre-*Miranda* silence for the impeachment of the defendant's testimony, is not constitutionally proscribed. *Id.* Pre-arrest silence, under *Jenkins v. Anderson*, likewise, may be used to ***cross-examine*** and impeach an accused who testifies. 447 U.S. 231, 238.

The Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284 (1986) is instructive. That case held that the post-*Miranda* silence of the defendant could not be used to rebut his insanity defense. The Court noted that, unlike *Doyle* and its progeny, the silence in *Wainright* was used as affirmative proof in the case-in-chief, not as impeachment. *Id.* at 292. The resulting Constitutional violation could thus be viewed as "especially egregious," because, unlike *Doyle*, there was no risk "that the exclusion of the evidence [would] merely provide a shield for perjury." *Id.* at n.8. The use of silence here in the prosecution case-in-chief as proof of guilt, not as impeachment of trial testimony, likewise cannot be justified as being necessary to deter perjury, since the prosecutor never argued the silence as reflecting on the credibility or truthfulness of petitioner's testimony.

In *Anderson v. Charles*, 447 U.S. 404 (1980) the Court permitted questions on cross-examination regarding inconsistencies between an accused's trial testimony and post-*Miranda* statements. The Court held that *Doyle* did not apply because a defendant who speaks after receiving

Miranda warnings has not remained silent at all regarding the subject of his statements and such questioning therefore makes no unfair use of such silence. Such prosecutorial cross-examination is proper "because the questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." *Id.* at 409.

By contrast, the argument here was designed to draw meaning from silence; it sought to attribute guilt to Alex Valentine's silence in the face of a supposed accusation ("You are under arrest for murder"). This Court's cases have provided a comprehensive framework of analysis regarding silence as evidence. This Court has held that the substantive use of silence as evidence of guilt after arrest is unconstitutional (*Griffin*, *Miranda*). The use of silence to impeach an accused's trial testimony when the silence followed *Miranda* warnings, is forbidden, both as a matter of the Court's supervisory power in federal cases and as a matter of Constitutional principle (*Hale*, *Doyle*). The use of pre-arrest silence to impeach is proper because such silence does not implicate the Fifth Amendment (*Jenkins*). Post-arrest, pre-*Miranda* silence may be used to cross-examine and impeach a defendant who testifies (*Fletcher*), but the use of silence as substantive evidence of guilt is improper.

Certiorari should be granted because the decision in this case violates two essential principles of the clearly established law as determined by this Court's precedent: (1) it permits the use of an accused's post-arrest silence in the prosecution's case in chief, not simply for impeachment or cross-examination; and (2) it permits silence to be used as substantive proof of guilt.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG FEDERAL CIRCUIT COURTS

Eight federal circuit courts have held that this Court's case law requires a finding that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates a defendant's Fifth Amendment rights. See, *e.g.*, *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981); *United States* ex rel. *Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987); *see also United States v. Hernandez*, 948 F.2d 316 (7th Cir. 1991); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997); *Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000); *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir. 2001) (*en banc*) (since the right to remain silent derives from the Constitution and not the *Miranda* warnings, prosecutorial comment on post-arrest silence in its case-in-chief violates the Fifth Amendment).

In *United States v. Caro*, the Second Circuit concluded, "we have found no decision permitting the use of silence, even the silence of a suspect who has been given *Miranda* warnings and is entitled to none, as part of the Government's direct case." 637 F.2d at 876.

The Seventh Circuit has held "the state's suggestion that use of a defendant's silence to impeach his trial testimony presents a constitutional issue, but the use of his silence to imply guilt does not, is nothing short of incredible, given the language of our constitution and the

interpretation it has been consistently given." *U.S.* ex rel. *Savory v. Lane*, 832 F.2d at 1018.

The Seventh Circuit explained:

> Because appellant did not take the stand, and the state's purpose in referring to appellant's silence was to suggest that he was guilty (rather than impeach his testimony), the problem does not involve the application of *Doyle v. Ohio* as the state seems to imply, but rather involves the application of *Griffin v. California*. That case held that neither the prosecutor nor the court may invite the jury to draw an inference of guilt from an accused's failure to take the stand. This court has specifically held that where impeachment by silence is permissible, the government may not argue that a defendant's silence is inconsistent with a claim of innocence. *United States v. Shue*, 766 F.2d 1122, 1130 (11th Cir. 1985) . . . . Thus, the case is distinguishable from the cases the state cites such as *Fletcher v. Weir* and *Jenkins v. Anderson*, where the government used the defendant's silence to impeach his trial testimony.

U.S. ex rel. Savory v. Lane, *supra*, at 1117. (citations omitted)

Three circuits reach a different result. *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991) holds that the prosecution may use pre-*Miranda* silence as substantive evidence of guilt. *Id.* at 1568. See also *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

In *United States v. Frazier*, 408 F.3d 1102, 1110-11 (8th Cir. 2005), the Eighth Circuit Court of Appeals ruled that the prosecution properly used Frazier's post-arrest pre-*Miranda* silence during the government's case-in-chief.

Because the accused was under no government-imposed compulsion to speak as a result of his arrest, *Frazier* held that silence after arrest may properly be used, not simply to impeach, but as substantive evidence of guilt.

Three circuits have taken the view only the magic of *Miranda* warnings enable an arrested defendant to stand mute, and that after arrest, an accused's silence may be used at his trial to prove he is guilty of the crime charged. Eight circuits take a consistent and different position, as the Court's jurisprudence and the Constitution compel them to. This Court should grant *certiorari* to resolve this circuit split.

THE STATE VIOLATED THE SIXTH AMENDMENT BY INTRODUCING EVIDENCE OF COMPLEX AND SENSITIVE DNA TESTS THROUGH A "READER" WHO HAD NEITHER CONDUCTED NOR WITNESSED THE TESTS

The prosecution presented two DNA witnesses. The first, Annette Peer, testified to certain limited DNA test results. (App. 107) The second and most important witness was Charlotte Word, an employee of Cellmark, a commercial profit-making company which tests DNA and provides expert witness testimony. (App. 96) Word performed none of the extensive tests to which she testified. *Id.* Melessa Weber, another Cellmark employee, performed the Cellmark DNA testing. *Id.* Word merely reviewed Weber's report and then testified to the results in the report. *Id.*

The accuracy of DNA tests depends on the testing technician's scrupulous adherence to testing procedures. (App. 103) If these procedures are not allowed properly, specimens can be contaminated and results become unreliable. *Id.*

Mr. Valentine was not able to question the analyst who actually conducted these sensitive and complex tests because the witness, Word, had performed none of these tests. Word could only testify that proper procedure should have been followed. She could not testify from personal knowledge as to whether these procedures were actually followed.

In this case "faint bands" appeared on the testing film. (App. 105) If these bands were the result of the test, then the bands would prove the presence of another person's DNA and possible contamination of the tests. *Id.* The prosecution attempted to establish that these bands were "technical artifacts." *Id.* Word admitted, however, that the bands could also represent the presence of another person's DNA, which would completely change the analysis and findings of Weber. *Id.* Whether the issue of confrontation in this case is analyzed under *Ohio v. Roberts*, 448 U.S. 56 (1980) or *Crawford v. Washington*, 541 U.S. 36 (2004), the unconstitutionality of the trial procedure employed here is clear. The state put before the jury the testimonial statement of the forensic analyst, Weber, by having Word read Weber's report and findings to the jury, while evading cross-examination as to Weber's bias, actions, competency, and qualifications. This denial of cross-examination was effected by the state's use of the "business records" exception to the hearsay rule in a distorted and unfair way.

The business records exception to the hearsay rule is grounded upon the notion that such records are inherently reliable. See John William Strong, McCormick on Evidence § 285-87 (4th ed. 1992) This is true for two main reasons: First, the creators of such records are generally

required to adhere to certain procedure when creating the records. *Id.* at § 288. Second, they are generated in the "normal course of business," not for the purpose of litigation or for other self-serving reasons. Strong, at § 288; see also *Palmer v. Hoffman*, 318 U.S. 109, 111-14 (1943). Business records have historically included such things as "shop books," account books, time cards, files, and other recordations of daily business transactions. Strong at § 287.

Cellmark's DNA tests are nothing like the kind of records contemplated by the business records exception. They represent forensic ***results*** from complex reports whose accurate results depend upon the competence of the analyst and adherence to a complex testing protocol. In *Palmer*, this Court described business records as "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." *Palmer, supra*, at 113. "The trustworthiness of business records lies in the fact that they are routine reflections of the day-to-day operations of a business . . . " and are "record[s] made for the systematic conduct of the business as a business." *Id.* at 113-14. DNA tests do not record an event, occurrence or a routine operation of a business. While it may be the business of Cellmark to produce DNA tests, DNA tests are not "made for the systematic conduct of the business as a business." *Id.* at 113. DNA tests are highly sensitive, highly complex tests which require sophisticated scientific interpretations. The DNA tests are not business records simply because they were prepared by Cellmark, whose business it is to perform DNA tests:

> If experts were permitted to prepare documentation of their findings and submit the documentation as a business record because, as experts, they prepared the documentation pursuant to their normal course of business, then they would be permitted to introduce a great degree of bias into the proceedings and would never be subject to cross-examination.

State v. Lane, 108 Ohio App. 3d 279, 279-80 (1995).

Cellmark's DNA tests, unlike business records, were prepared in anticipation of litigation. All of Cellmark's testing was performed at the request of the prosecution. When a document is prepared in anticipation of litigation, "the underlying rationale of trustworthiness is supplanted by a natural motivation to color the facts in favor of the requesting entity." *State v. Lane, supra*, at 288 (citing *Palmer, supra*, at 113). As the *Palmer* court noted:

> Preparation of cases for trial by virtue of being a "business" or incidental therein would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. [citations omitted]. Regularity of the preparation would become the test rather than the character of the records and their earmarks of reliability [citations omitted] acquired from their source and origin and the nature of their compilation.

Palmer, supra, at 113-14.

The distortion of the common law concept of "business records" permitted the prosecution to introduce results of tests without subjecting the analyst, who did the test,

found the results and wrote the report, to the scrutiny and testing of cross-examination.[1] The procedures here violated the Confrontation Clause in two ways: (1) there was no showing of the unavailability of Weber, the analyst, nor of the reliability of the results of her testing; and (2) Weber's testimonial findings were placed before the jury by the reading of her report results, a procedure equivalent to trial by affidavit. *Crawford v. Washington*, *supra*, at 43-46.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the petition for a writ of *certiorari*.

Dated December 19, 2005

Respectfully submitted,

EUGENE G. IREDALE
Counsel of Record
105 West "F" Street,
Fourth Floor
San Diego, California 92101
(619) 233-1525

Counsel for Petitioner

[1] The possibility of abuse of the procedure used in this case to obviate the adversarial testing of evidence is illustrated by a recent revelation. The *Los Angeles Daily Journal* of November 19, 2004, in a front-page article headlined, "DNA Lab Fires Technician for Faking Results," reported that Cellmark Laboratory (the same lab as in this case) fired a technician for "falsifying results in at least a dozen cases" in tests for the Los Angeles Police Department and the FBI.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER VALENTINE, Petitioner-Appellee, v. EDWARD S. ALAMEIDA, JR., Warden, Respondent-Appellant.	No. 04-55208 D.C. No. CV-01-00681-NAJ MEMORANDUM* (Filed Aug. 8, 2005)
ALEXANDER VALENTINE, Petitioner-Appellant, v. EDWARD S. ALAMEIDA, JR., Warden, Respondent-Appellee.	No. 04-55365 D.C. No. CV-01-00681-NAJ

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted July 12, 2005
Pasadena, California

Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Respondent appeals the district court's conditional grant of Alexander Valentine's petition for a writ of habeas corpus, and Valentine cross-appeals the district court's order denying the petition on one ground. We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the district court's conditional grant of the petition and affirm its denial of habeas relief.

The district court concluded that the prosecution's use of Valentine's post-arrest, pre-*Miranda* silence as evidence of guilt violated his Fifth Amendment privilege against self-incrimination, and that the state court unreasonably applied clearly established Supreme Court law when it concluded that this use of Valentine's silence was permissible. We may grant a writ for a petition of habeas corpus if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

We cannot conclude that the state's decision was contrary to, or an unreasonable application of, clearly established Supreme Court precedent because there is no precedent that is clearly applicable to these facts. The Supreme Court has held that any admission at trial of post-*Miranda* silence is a violation of a defendant's due process rights. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). However, the Court allows the admission of a defendant's pre-*Miranda* silence for impeachment purposes when a defendant testifies at trial. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). Although Valentine's silence was first introduced prior to his taking the stand, Valentine took the stand and presented testimony that he was silent when told he was under arrest for murder. Because Valentine testified to his own silence, neither *Doyle* nor *Fletcher*

clearly applies to these facts. We conclude that the state court decision is not contrary to Supreme Court law, and consider whether the state court's application of clearly established law was objectively unreasonable.

Circuit court precedent is relevant only to the extent that it "illuminates the application of clearly established law." *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). In this case, circuit court precedent reveals a divergence of opinion in cases addressing this issue. *Compare United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) (holding that introduction of defendant's pre-*Miranda* custodial silence is violation of Fifth Amendment); *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000) (same) *with United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005) (holding that when no governmental action induced post-arrest, pre-*Miranda* silence, it could be introduced as evidence of guilt); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (concluding that the prosecution may comment on a defendant's silence prior to *Miranda* warnings). The divergent circuit precedent reveals that there is not clearly established law applicable to these facts. We therefore cannot conclude that the state court's decision constituted an unreasonable application of clearly established federal law. The district court concluded that admission of DNA test results as business records deprived Valentine of his rights under the Sixth Amendment's Confrontation Clause. We conclude that the state appellate court's determination that the DNA test results had sufficient indicia of reliability to satisfy the Confrontation Clause was a reasonable application of the clearly established law of *Ohio v. Roberts*, 448 U.S. 56, 65-66,

(1980).[1] the district court incorrectly applied *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943), in this circumstance, because *Palmer*, an interpretation of an early federal evidentiary rule, does not establish a constitutional principle that is applicable to the states under 28 U.S.C. § 2254(d)(1). *See Early v. Packer*, 537 U.S. 3, 10 (2002). Under *Roberts*, business records are generally considered sufficiently reliable to survive a Confrontation Clause challenge. 448 U.S. at 66 n.8; *see also United States v. Miller*, 830 F.2d 1073, 1077 (9th Cir. 1987) (holding that admission of business records does not violate the Confrontation Clause under *Roberts*). The record at issue was prepared in the routine course of business and was introduced by a competent expert who could be questioned about the limitations of the information presented. It was reasonable for the state court to determine that Valentine's right to confrontation was not violated by the admission of this evidence.

The district court found that Valentine's due process rights were violated by the trial judge's erroneous limitation on his ability to cross-examine a prosecution witness. The state appellate court found that the trial court erroneously excluded the line of questioning as hearsay, but that the error was harmless. Even if Valentine's due process rights were violated by this restriction, we cannot conclude that the error had a "substantial and injurious effect" on the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks and citation omitted). The district court found that, taken on their own, the

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[1] Although *Roberts* was abrogated by *Crawford v. Washington*, 541 U.S. 36, 55-56 (2004), *Crawford* addresses only "testimonial hearsay," which does not include business records, *id.* at 68.

errors it identified were not prejudicial, but that cumulatively the errors caused it to gravely doubt whether the jury would reach the same verdict. Because we conclude that admission of Valentine's post-arrest, pre-*Miranda* silence was not objectively unreasonable and that admission of DNA evidence as business records did not violate the Confrontation Clause, we conclude that there is no cumulative error.

The district court correctly denied relief on Valentine's claim that his constitutional rights were violated by the admission of evidence that Valentine inquired whether officers had a search warrant. Although this court has ruled on direct appeal that the exercise of Fourth Amendment rights cannot be used as evidence of guilt, the Supreme Court has not reached a conclusion on this issue. *United States v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978); *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966) (reserving this question). The state court did not unreasonably apply clearly established law when it did not extend Fifth Amendment principles to the Fourth Amendment context. *See Leavitt v. Arave*, 383 F.3d 809, 828 n.15 (9th Cir. 2004) (suggesting that the right not to have the exercise of Fourth Amendment rights introduced as evidence of guilt is not clearly established federal law). Furthermore, the evidence did not show that Valentine was exercising his Fourth Amendment rights. The district court correctly denied relief on this claim.

REVERSED in part, AFFIRMED in part.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALEXANDER VALENTINE, Petitioner, v. EDWARD S. ALAMEIDA, JR., Director, Respondent.	Civil No. 01cv0681 J (RBB) **ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS** (Filed Jan. 7, 2004)

Before the Court is Magistrate Judge Burns' Report and Recommendation ("R&R") recommending that Alexander Valentine's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be granted. Both Mr. Alameida's ("Respondent") and Mr. Valentine's ("Petitioner" or "Valentine") objections to the R&R were timely filed. The issues presented herein are decided without oral argument. *See* Civ. L. R. 7.1.d.1. For the reasons set forth below, the R&R is **ADOPTED** in its entirety, and the petition is **conditionally GRANTED**.

I. Background Facts

The petition before the Court involves the state criminal prosecution of Petitioner for the murder of his parents. On August 3, 1996, Kenneth and Diane Valentine were found murdered in Diane's office. The details of the crime are recounted in the R&R. (R&R at 4-6.) On September 26, 1996, an information was filed charging Alexander Valentine, the son of the victims, with the murders. (*Id.* at 2.) The prosecution's theory of the case was that Petitioner murdered his parents because he was afraid to tell them that he had failed out of college. At trial, the

prosecution presented, among other evidence, DNA evidence linking Petitioner to the crime and Petitioner's confession. Petitioner pled not guilty and at trial maintained his innocence. (R&R at 8.) He claimed that the confession was fabricated by the police and provided an alternative explanation for the prosecution's DNA evidence. (*Id.* at 9.) He also suggested an alternative theory to the jury about the true identity of his parents' murderer. Petitioner claimed that the murders were committed by an aggrieved business associate of his mother's, with whom she had been heatedly arguing earlier the day of the murders and of whom she was afraid. (*Id.* at 9.)

Valentine's trial lasted for two months. Ultimately, he was found guilty of the murders and sentenced to life without parole for the murder of his father and fifteen years to life for the murder of his mother to be served concurrently. (*Id.* at 3.) Petitioner appealed his conviction to the California Court of Appeal for the Fourth District, raising the same claims he raised in the instant petition. (*Id.*) The Court of Appeal affirmed his conviction. (*Id.*) He then filed a petition for review with the Supreme Court of California, again arguing the same claims. (*Id.*) The supreme court denied the petition without citation of authority on April 19, 2000. (*Id.*)

Petitioner filed the instant petition in this Court on April 18, 2001. Respondent filed an answer and notice of lodgment on August 9, 2001. Petitioner filed a traverse on September 25, 2001, and a document labeled "Petitioner's Citation of Additional Authority" on November 2, 2001. In his petition, Petitioner alleged that ten constitutional violations took place during his trial: (1) his Fifth Amendment rights were violated by the admission in evidence of an involuntary confession; (2) his Fifth Amendment rights

were violated by the admission in evidence of a confession that was obtained without a knowing and voluntary waiver of his *Miranda* rights; (3) his Fifth Amendment rights were violated by the state trial court's failure to instruct the jury to evaluate the reliability of his confession; (4) his federal due process rights were violated by the admission in evidence of the fact that he asked police officers whether they had a search warrant; (5) his Fifth Amendment rights were violated by the admission of his post-arrest, pre-*Miranda* silence as substantive evidence of his guilt; (6) his Sixth Amendment rights were violated by the admission of DNA testing evidence as business records; (7) his due process rights were violated by the state trial court's refusal to give jury instruction on the burden of proof as it related to third party liability; (8) his due process rights were violated by the state trial court giving an instruction on adoptive admissions; (9) his due process rights were violated by the cumulative effect of several incorrect evidentiary rulings; and (10) the prosecutor engaged in misconduct. (R&R at 1-2.)

The petition was referred to Magistrate Judge Larry Burns, who issued a report and recommendation in this case on July 9, 2003. (Doc. no. 16.) After careful consideration of the record and the parties' arguments in an 89 page R&R, Judge Burns found three constitutional violations, the cumulative impact of which undermined the reliability of the jury's verdict in Valentine's trial. (R&R at 89.) The R&R recommends granting the petition. Respondent and Petitioner have filed objections to the R&R.

II. Legal Standard

A. District Court Review of Report and Recommendation

The duty of the district court in connection with a Magistrate Judge's report and recommendation in habeas cases such as this is set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). When objections are made, the Court must make a *de novo* determination of the factual findings to which there are objections. *United States v. Raddatz*, 447 U.S. 667, 676 (1980). When no objections are filed, the Court may assume the correctness of the Magistrate Judge's findings of fact and decide the motion on the applicable law. *Campbell v. United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974). Under such circumstances, the Ninth Circuit has held that "a failure to file objections only relieves the trial court of its burden to give *de novo* review to factual findings; conclusions of law must still be reviewed *de novo*." *Barilla v. Ervin*, 886 F.2d 1514, 1518 (9th Cir. 1989) (citing *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)).

The Court must conduct a *de novo* review of those findings objected to by Respondent and Petitioner. However, neither Petitioner nor Respondent object to Judge Burns' findings of fact. Respondent objects to the following legal conclusions: (1) the conclusion that post-arrest, pre-*Miranda* silence is inadmissible as evidence of guilt, (Resp't Objections at 3); (2) the conclusion that the restriction on the cross-examination of Detective Donaldson violated Valentine's constitutional rights, (*Id.* at 8); and (3) the conclusion that the DNA testing results were inappropriately admitted as business records. (*Id.* at 11.) The

remaining findings have been objected to by Petitioner. (*See* Pet'r Objections.)

B. Standard of Review for Habeas Corpus Petitions

Pursuant to 28 U.S.C. § 2254(a), district courts have the following scope of review:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C.A. § 2254(a) (West 1994). Under 28 U.S.C. § 2254(d), as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp. 2003). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court's decision may be found to be "contrary to" clearly established Supreme Court precedent: (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Williams*, 529 U.S. at 405-06. A state court decision may involve an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or, "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, ___, 123 S.Ct. 1166, 1175 (2003) (quotation marks and citations omitted).

III. Respondent's Objections

A. The Use of Post-Arrest, Pre-*Miranda* Silence as Evidence of Guilt

Petitioner claimed that on the night of the murders he had waited up for his parents and had been worried when they had not arrived home. (R&R at 5-6.) Eventually, he fell asleep. (*Id.* at 8.) He was roused in the early morning by the police. (*Id.*) They asked that he come outside and placed him under arrest for murder. (*Id.* at 5.) When they told him that he was under arrest for murder, Petitioner was silent. (*Id.* at 6.) At trial, the prosecution was allowed to present evidence of this silence and to argue that it was evidence of Petitioner's guilt. The jury was instructed that they were permitted to conclude that Petitioner's silence constituted an admission of guilt. At trial, Petitioner's attorney vigorously and repeatedly objected to these allowances. In his petition, Valentine claimed that the use of this evidence against him violated his Fifth Amendment right to remain silent.

In the R&R, Judge Burns found that the admission of the evidence, the prosecutor's arguments, and the jury instruction impermissibly used Petitioner's silence against him in violation of the Fifth Amendment. Judge Burns found that the state appellate court applied the wrong law. The state court based its decision on *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Fletcher v. Weir*, 455 U.S. 603 (1982). Both of these cases involved the use of pre-*Miranda* silence to impeach. Neither considered whether silence can be used as substantive evidence. (R&R at 14-15, analyzing *Doyle* and *Fletcher*.) Judge Burns acknowledged that there is no Supreme Court precedent directly on point. (*Id.* at 16.) However, he explained that eight circuit courts, including the Ninth Circuit, have interpreted Supreme

Court precedent to prohibit this use of pre-*Miranda* silence. (*Id.* at 16.)

Judge Burns found that the admission of silence as substantive evidence of guilt violated Petitioner's Fifth Amendment rights. The adoptive admission jury instruction significantly increased the magnitude of the Fifth Amendment violation by highlighting Valentine's silence, and then telling the jury that it could consider the silence as evidence of guilt. (R&R at 22.) Based on the interpretation of Supreme Court precedent adopted by almost every circuit court of appeal, Judge Burns concluded "that the state court's decision was an unreasonable application of clearly established Supreme Court law because it 'unreasonably refuse[d] to extend a [clearly established legal] principal to a new context where it should apply.'" (*Id.* at 19 (quoting *Williams*, 529 U.S. at 407))

After determining that there had been a constitutional error, Judge Burns next considered what impact this error had on the jury. He concluded that he could not be certain that this error alone had a "substantial and injurious effect or influence determining the jury's verdict. (*Id.* at 27.)

1. Objection

Respondent objects to Judge Burns' statement of the controlling Supreme Court precedent. First, Respondent claims that "reasonable minds can differ regarding pre-*Miranda* silence as an adoptive admission." (Resp't Objections at 4.) Accordingly, he argues that the state court's ruling cannot be characterized as an unreasonable application of Supreme Court law, and the ruling should be upheld. He argues that the state court is only bound by

Supreme Court precedent, and, therefore, the rulings of the federal circuit courts are immaterial. (*Id.* at 5.) The circuit split on this issue supports his argument, he claims, because it shows that the state court's ruling was a reasonable application given the unsettled state of the law. (*Id.*) He states,

> the fact that there is disagreement between circuit courts on this point necessarily means that the state court determination was not contrary to or an unreasonable application of controlling United States Supreme Court precedent. In light of the disagreement between the circuit courts, even if it could be determined that the state court determinations in this case were incorrect, they are not **objectively unreasonable**.

(*Id.* (emphasis in the original).)

Respondent also argues that the specific circumstances of this case suggest the reasonableness of the state court's conclusion that the silence was an admission. Before Valentine emerged from his house, the police spent a significant amount of time trying to gain the attention of the house's occupants. They knocked on his doors and windows and received no response. Respondent argues that these facts suggest that Valentine's subsequent failure to question the detective's statement, "you are under arrest for murder," "is an admission the state court could reasonably conclude could be admitted into evidence without error." (Resp't Objections at 5.)

Respondent's second argument is an out-growth of his first. He argues that the rule applied in the R&R regarding use of post-arrest, pre-*Miranda* silence is "*Teague*-barred." (Resp't Objections at 6.) The Supreme Court has prohibited the granting of habeas relief on the basis of a

"new rule." *Teague v. Lane*, 489 U.S. 288, 310 (1989).[1] The Court explained that a "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. Here, Respondent reiterates his first argument that the holdings of the federal courts of appeal "have no legal significance." (Resp't Objections at 7.) Respondent claims that the R&R inappropriately rejected the state court determination based on these irrelevant federal holdings. (*Id.* at 7.) Respondent claims that by doing this, Judge Burns created a "new rule" after Petitioner's direct appeal. Accordingly, Respondent asserts that the "new" rule cannot be applied to Valentine's case, and the Court should reject the R&R's conclusion. (*Id.* at 8.)

2. Discussion

As stated above, the role of this Court is to determine whether the state court's adjudication of Petitioner's due process claim was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). Judge Burns concluded that "the state court's decision was an unreasonable application of clearly established Supreme Court law because it 'unreasonably refuse[d] to extend a [clearly established legal] principle to a new context where it should apply.'" (R&R at 19 (citing *Williams*, 529 U.S. at 407).) This Court agrees.

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[1] There are two exceptions to this general prohibition. A new rule may be applied retroactively in a case of collateral review (1) "if it places certain 'kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" or (2) "if it requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (citations omitted).

While there is no Supreme Court precedent directly on point, eight federal circuit courts have held that Supreme Court case law requires a finding that the use of pre-*Miranda* silence as evidence of guilt violates a defendant's Fifth Amendment rights. *See, e.g.*, *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981); *United States v. Savory*, 832 F.2d 1011, 1017 (7th Cir. 1987); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997); *Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000); *United States v. Whitehead*, 200 F.3d 634, 638 (9th Cir. 2000); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1028-30 (9th Cir. 2001).

In *United States v. Caro*, the Second Circuit reviewed Supreme Court precedent regarding the use of a defendant's silence against him. 637 F.2d at 875-76. The court concluded, "we have found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case." *Id.* at 876.

Considering the same issue, the Seventh Circuit held, "the state's suggestion that use of a defendant's silence to impeach his trial testimony presents a constitutional issue, but use of his silence to imply guilt does not, is nothing short of incredible, given the language of our constitution and the interpretation it has been consistently given . . . we find the error in referring to the defendant's silence to be of constitutional magnitude . . . " *U.S. ex rel. Savory*, 832 F.2d at 1018.

The Ninth Circuit has also addressed this issue. Citing the Supreme Court, the Ninth Circuit explained,

"[t]he Fifth Amendment provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.' . . . This right to remain silent carries an 'implicit . . . assurance' that silence will carry no penalty." *Velarde-Gomez*, 269 F.3d at 1028 (citing *Dolye v. Ohio*, 426 U.S. 610, 618 (1976); *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37 (1966)). Discussing the Supreme Court's landmark decisions in *Miranda*, *Doyle*, and *Griffin v. California*, 380 U.S. 609, 614 (1965), the Ninth Circuit concluded, "once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given. Moreover, the government may not burden that right by commenting on the defendant's post-arrest silence at trial." *Velarde-Gomez*, 269 F.3d at 1029.

In another recent case, the Ninth Circuit held that the trial court committed plain error by admitting a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt. *Whitehead*, 200 F.3d at 639. The court held, "regardless whether the *Miranda* warnings were actually given, comment on the defendant's exercise of his right to remain silent was unconstitutional." *Id.* at 638. The Ninth Circuit cited a number of federal circuit court cases for this proposition. Notably, in support of its holding, it also cited *Miranda* itself and a dissent from Justice Scalia interpreting *Miranda*. *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37 (1966) ("The prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his [Fifth Amendment] privilege [against self-incrimination] in the face of accusation"); *Mitchell v. United States*, 526 U.S. 314, 338 n. 2 (1999) (Scalia, J., dissenting) (noting that the Supreme Court "did say in *Miranda v. Arizona* that a

defendant's postarrest silence could not be introduced as substantive evidence against him at trial")).

The error made by the California court stemmed from its reliance on the wrong body of law in its ruling. When deciding how to rule on the use of this evidence, the state court relied on *Doyle v. Ohio*, 426 U.S. 610 (1976), and *Fletcher v. Weir*, 455 U.S. 603 (1982), which only address the use of silence to impeach. (Pet. Ex. A at 36-37.) The Seventh Circuit eloquently explained why the rules regarding use of silence to impeach are not applicable when considering the use of silence in the government's case in chief:

> Because appellant did not take the stand, and the state's purpose in referring to appellant's silence was to suggest that he was guilty (rather than to impeach his testimony), the problem does not involve the application of *Doyle v. Ohio* as the state seems to imply, but rather involves the application of *Griffin v. California*. That case held that neither the prosecutor nor the court may invite the jury to draw an inference of guilt from an accused's failure to take the stand. . . . the case is distinguishable from the cases the state cites such as *Fletcher v. Weir* and *Jenkins v. Anderson*, where the government used the defendant's silence to impeach his trial testimony. After all, there is no constitutional right to commit perjury, which impeachment is designed to detect. Because of this, the *Doyle* rule is predicated on the implied promise of the *Miranda* warnings. The cases which have allowed impeachment by silence rely on the fact that the defendant opens himself to impeachment by taking the stand. . . . There is, on the other hand, a constitutional right to say nothing at all about the allegations.

> While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition.

U.S. ex rel. Savory v. Lane, 832 F.2d 1011, 1017-18 (7th Cir. 1987) (citations omitted). The Court agrees that Supreme Court precedent requires this conclusion, as do seven of the eight federal courts of appeal that have addressed this issue.

There is one circuit court that has rejected the above analysis and reached the same conclusion as the California court in Valentine's case. *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). Respondent argues that the Eleventh Circuit's divergent decision has created a circuit split, indicating that there is no clearly established Supreme Court precedent and that the California court's holding was reasonable. However, the Eleventh Circuit employed the same faulty logic used by the California court in this case. In *Rivera*, the Eleventh Circuit held that the prosecution may use pre-*Miranda* silence as substantive evidence against a defendant. *Id.* at 1568. The court cited *Fletcher v. Weir* and *Jenkins v. Anderson* in support of its holding. However, both of these cases address the use of silence to impeach, not as substantive evidence of guilt. As discussed above and in the R&R, because of this critical distinction, these cases do not represent the legal principle governing the use of silence as evidence of guilt. (R&R at 15.) The Eleventh Circuit in *Rivera* and the state court in Valentine's case made the same error.

Moreover, Respondent incorrectly assumes that one outlying case automatically establishes that the state

court must have been reasonable. The inquiry for a federal court in review of a Section 2254 petition is whether the state court decision was objectively reasonable, not whether there has been any actual agreement with the decision. The Supreme Court has explained this distinction:

> Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one.

Williams v. Taylor, 529 U.S. 362, 410 (2000) (affirming the Fourth Circuit's interpretation of the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1)). Here, Judge Burns correctly concluded (R&R at 19) that the state court's decision was an unreasonable application of clearly established Supreme Court law because it "unreasonably refuse[d] to extend a [clearly established legal] principal to a new context where it should apply." *Id.* at 406. This conclusion is not undermined by the Eleventh Circuit's divergent opinion.

The Court finds that the state court holding regarding the use of Valentine's silence against him was objectively unreasonable. The California court identified the wrong legal standard and, in applying it, reached a conclusion

that is inapposite to that required by clearly established Supreme Court precedent. While there is no Supreme Court case law addressing the facts of this case, the rationale of *Miranda*, *Griffin*, and the other cases discussed above require the outcome reached by the R&R. The Court finds the R&R correctly concludes that the state court unreasonably refused to extend a clearly established legal principal to a new context where it should apply. The controlling rule is dictated by precedent that existed at the time Valentine's conviction became final. The R&R does not apply a "new" rule, hence, there is no *Teague* problem raised by the R&R's conclusion. *See Teague*, 489 U.S. at 301.

B. Restriction on the Cross-Examination of Detective Donaldson

At Valentine's trial, the prosecution called Detective Robert Donaldson as a witness. Detective Donaldson was one of the detectives who arrested Petitioner. It was Donaldson who informed Valentine that he was under arrest for murder. (R&R at 6.) Also, Donaldson was one of the detectives who transported Valentine from the police station to the jail the morning after his arrest. During this car ride, Valentine allegedly confessed to the murders. (*Id.*) At the time of this trip, Valentine had already invoked his right to counsel. During the car ride, Valentine asked Donaldson, "I want to tell you something. Can it be used against me?" (*Id.* at 41). Donaldson responded, "Well you asked for a lawyer, but you can tell me if you want." (*Id.*) Thereafter Valentine allegedly confessed to the murder of his parents.

During cross-examination, Valentine's attorney attempted to ask Donaldson about a visit he made to Valentine's jail cell on August 5, 1996, two days after the alleged confession. (R&R at 55.) The defense stated that the purpose of the questioning was to refute Donaldson's "claim that he did not question the defendant or would not have questioned the defendant or that this statement was not made in response to questioning from him" and to show that "[Donaldson] was asking questions, which refutes his claim that he wouldn't have asked questions and didn't ask questions." (Lodgment No. 1, Vol. 18 at 3485-3486.) The trial court sustained a hearsay objection to this line of questioning. The R&R concluded that this ruling was in error because the evidence was not offered for the truth of the matter asserted, but as evidence of verbal acts. (R&R at 56.) Judge Burns then considered the Ninth Circuit's test for determining whether a court's exclusion of defense evidence violates the Constitution, from *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). (*Id.* at 57.) The Judge concluded that the *Tinsley* factors weighed in Valentine's favor, therefore, "the restriction on the cross-examination of Donaldson violated Valentine's due process rights." (*Id.* at 59.)

Respondent's objection is based on his assertion that the state appellate court found that Petitioner was procedurally barred from raising a claim based on this ruling. According to Respondent, at the time Valentine objected to this ruling at trial, he was instructed by the trial judge to raise the objection again the following day. He failed to do so, therefore the appellate court found that he had not preserved the issue for appeal and was barred from raising it. (Resp't Objections at 9.)

Plain reading of the record reveals that the objection that Respondent is referring to is not the objection at issue here. During the cross-examination of Detective Donaldson regarding the August 5th jail visit, there were two hearsay objections that Respondent appears to be confusing. First, there was an objection to questions asked about what was said during a portion of the conversation during which a tape recorder was running. Next, a second objection was made to questions about what was said during a portion of the conversation during which the tape recorder was off.

The first objection, made to questions about the conversation when the tape recorder was on, was sustained by the trial court, never revisited, and not addressed by the appellate court. With respect to this first objection, the colloquy at sidebar went as follows:

> Defense Counsel: . . . He questioned Mr. Valentine on the 5th of August . . . he asked him questions about, 'Do you remember when we were taking you to the jail in our police car? Do you remember getting into the jail? Do you remember what was said? You don't remember us taking you?' He was questioning then, and it refutes, I suggest, his claim that he did not question the defendant or would not have questioned the defendant [after defendant invoked *Miranda* rights'] or that this [roadside] statement was not made in response to questions from him.
>
> * * *
>
> Defense Counsel: I don't care about [Valentine's] response. I want to show that he was asking questions, which refutes his claim that he wouldn't have asked questions and didn't ask questions.

> The Court: This is pure unadulterated hearsay and that's what its being offered for. The objection is sustained.

(Pet. Ex. A. at 58-59.)

It was the second objection, ***not the first***, regarding the conversation after the tape recorder was off, that the trial court told the parties to raise again the following day. As the state appellate court reported,

> Defense counsel proceeded with his cross-examination of Donaldson and established that the detective went to the jail on August 5 to talk with Valentine, brought a tape recorder with him, tape-recorded the conversation and, at one point, turned off the tape recorder for five minutes before turning it back on. Donaldson testified he did not remember what he and Valentine talked about during the five minutes. The court did not allow any further questioning on the issue.
>
> When the court adjourned for the day, defense counsel revisited the issue, asking the court if it would be permissible to ask Donaldson "what was the subject matter, not the contents but the subject matter, of the discussion when the ***tape was turned off***" The prosecutor objected on hearsay grounds. . . . The court then suggested both counsel ask Donaldson "so that you can inform me as to whether it pertains to anything reasonably here or doesn't" Counsel were to inform the court "first thing in the morning." The issue was not brought up by either counsel the next morning.

(Pet. Ex A at 60-61 (emphasis added).) After summarizing the factual scenario surrounding the second objection, the appellate court held, with respect to the second objection,

> It is clear that the trial court was willing to revisit its hearsay ruling and explore allowing Valentine to question Donaldson on the subject matter of the jail discussion on August 5 when the ***tape recorder was turned off***. The court invited defense counsel to make a new offer of proof to satisfy its concern about relevancy.
>
> The proverbial ball was in Valentine's court. However, the matter was not pursued. By failing to press the issue, the defense did not preserve its claim of error for review on appeal.

(*Id.* at 61 (emphasis added).) It is this passage that Respondent cites as proof of the procedural default that forms the basis for his objection. (Resp't Objections at 9.)

The Respondent's discussion of this issue shows that he is concerned with the second objection. In addition to arguing that the claim was procedurally barred, Respondent also argues, "the magistrate ignored the fact that Detective Donaldson testified in front of the jury that he could not remember what was said during the five minutes that the tape recorder was turned off. Cross-examination on that topic was not possible." (Resp't Objections at 11.) Respondent fails to recognize however that Petitioner's claim relates to the first objection, not the second.

Evidently, Respondent has misread both the R&R and Petitioner's claim. The petition clearly states that it is raising a claim regarding this first objection, not the second. It cites much of the text of the colloquy over the first objection that is cited above. (Pet. at 72.) It also

explains that the nature of the error arises from the fact that these specific questions asked by Donaldson, cited in the first colloquy, were verbal acts evidence and not hearsay. (*Id.* at 73.) Judge Burns' discussion of this hearsay problem focuses on the first objection as well. (R&R at 56-57.) Accordingly, Respondent's discussion of the ruling on the second objection is irrelevant. For the foregoing reasons, Respondent's objection to this portion of the R&R is erroneous. Respondent makes no objections to the remainder of Judge Burns' analysis. The Court finds that the R&R correctly concluded that the restriction on the cross-examination of Donaldson violated Valentine's due process rights.

C. Admission of DNA Tests Under the Business Record Exception

At trial, the prosecution presented DNA evidence against Valentine in its case in chief. In addition to the DNA tests performed by the police department, the prosecution presented DNA tests performed by an expert, Cellmark, who had been retained solely for the purpose of the litigation by the prosecution. The trial court admitted Cellmark's DNA testing as a business record. Accordingly, the prosecution was only required to present a "custodian or qualified witness [to] testify[] to its identity and the mode of preparation." Cal. Evid. Code § 1271. The prosecution called Dr. Charlotte Word, an expert in DNA testing at Cellmark who reviewed the testing in the Valentine case but did not perform the tests herself. Because the evidence was admitted as a business record, Valentine was deprived of the opportunity to cross-examine Melissa Weber, the scientist who performed the DNA tests and prepared the reports. Petitioner claimed that the trial

court's decision to allow DNA evidence to come in as a business record violated his Sixth Amendment right to confront witnesses against him. Judge Burns agreed.

1. Objections

Respondent objects to this conclusion on two grounds. He contends that "experts constantly rely on hearsay evidence and testify from the work of others." (Resp't Objections at 12.) Experts are permitted to give testimony based on inadmissible records. Here, however, the records themselves and not just the expert's testimony were admitted into evidence. Records may only be admitted into evidence if there is an evidentiary basis for doing so. The fact that an expert opinion formed from review of inadmissible records is admissible has no bearing upon the admissibility of the records themselves.

Furthermore, Dr. Word did more than simply testify to her independent conclusions based on her review of Cellmark's DNA evidence. In addition to her opinion testimony, Dr. Word testified to the actual findings of Melissa Weber's testing. (Lodgement 1, Vol. 14 at 2556, 2557 (explaining that "what Dr. Word is going to be testifying to is the testing that was done at Cellmark . . . she will also be testifying to the PCR STR testing results by the same scientist, Melissa Weber, at Cellmark and the frequencies that were obtained on that.").) It is this portion of her testimony to which Petitioner objects. (Pet. at 54.) Experts may be allowed to review inadmissible documents as a basis for forming an opinion, however, they are not permitted to disclose that inadmissible evidence to the

jury.[2] Here, not only did the witness disclose the contents of the underlying records, the records themselves were admitted into evidence. These actions provide a valid basis for Petitioner's Sixth Amendment challenge, and Respondent's disagreement is unfounded.

The remainder of Respondent's objections to the R&R's holding on this issue focus on asserting that Valentine was not prejudiced by this admission. (Resp't Objections at 12-14.) Respondent argues, "[t]he magistrate judge found constitutional error and prejudice from the fact that Petitioner could not question the person who actually tested the DNA regarding possible contamination or error in the technique of testing. This finding ignores several important facts that were before the California Court of Appeal." (*Id.*) Respondent then lists additional DNA evidence presented at Valentine's trial, the admission of which is not challenged in the petition. Respondent also notes that DNA samples were turned over to the defense for testing. He concludes, "It seems strange to find a

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[2] In *People v. Price*, 821 P.2d 610, 661 (Cal. 1991), the California Supreme Court held that "an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence."

Federal Rule of Evidence 703 states that "facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." The 2000 Advisory Committee Note to this rule explains that "if the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes."

violation of due process and denial of constitutional right of confrontation in these circumstances." (*Id.*)

The facts highlighted by Respondent fail to undermine the strength of the R&R's findings. The nature of other evidence offered against Valentine has no bearing on whether there was a confrontation clause violation. Other evidence presented by the prosecution relates to the harmless error analysis, to which Respondent does not object because he presumably agrees with Judge Burns' conclusion that "the Court cannot say with sufficient certainty that the Sixth Amendment violation *by itself* had a substantial and injurious effect on the jury's verdict." (R&R at 40.) Similarly, the fact that the defense could have done its own testing and the prosecution was expecting "a battle," thereby explaining its decision to call an expert other than Melissa Weber, does not alleviate the constitutional infirmity identified by Judge Burns.

For the foregoing reasons, the objections made by Respondent to this section of the R&R are without merit. Now, the Court will turn to its de novo review of the R&R's conclusions of law.

2. The Confrontation Clause

It has been established that "a federal habeas court cannot review questions of state evidence law. It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999) (citations omitted). Accordingly, the Court can only grant habeas relief on Valentine's claim regarding this

evidence if it finds that the state evidentiary ruling was so fundamentally unfair that it violated due process.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right has been held to include the right to cross-examine these witnesses. *Pointer v. Texas*, 380 U.S. 400, 401 (1965). This "fundamental right" is applied to the states through the operation of the due process clause of the Fourteenth Amendment. *Id.* at 403. The Supreme Court has held that to deny a criminal defendant the right to confrontation is so fundamentally unfair that it constitutes a violation of due process. Discussing the accused's right to cross-examine witnesses against him, the Supreme Court explained,

> [t]he fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution . . . There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 404, 405.

3. State Court Analysis

The state appellate court held that the admission of Cellmark's DNA testing as a business record was proper pursuant to California Evidence Code section 1271. The court concluded that Valentine was not deprived of his right to confront witnesses because "a document that has been admitted under the business records exception has adequate indicia of reliability to satisfy the requirements of the confrontation clause." (Pet. Ex. A at 47-48) (citations and quotation marks omitted). However, the state appellate court failed to consider whether federal constitutional law bars the application of the business record exception to these records.

Both the state court and Respondent focus their response to Valentine's confrontation clause claim on the validity of the evidentiary ruling under state law. However, the question of whether there has been a violation of Petitioner's Sixth Amendment right to confrontation is distinct from whether California law permits admission of this evidence as a business record. While the state appellate court purports to engage in Sixth Amendment analysis, quoted above, it uses its ruling on California's evidence law to avoid the substance of Petitioner's constitutional claim; in short, the appellate court held that there was no Sixth Amendment violation because the evidence was property admitted under California law.

The Ninth Circuit has held "that failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief. While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are

violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness." *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). In other words, just because a ruling is proper under state law does not mean that a federal court may not review it for constitutional error in a habeas action. If this were not the case, state law could routinely be used to insulate state courts from the application of federal constitutional law. Surely the fact that an evidentiary ruling complied with California's version of the business record exception is not the end of the inquiry into whether the admission of this evidence deprived Petitioner of his Sixth Amendment right to confront witnesses against him.

The state court's analysis of Petitioner's Sixth Amendment claim was contrary to clearly established Supreme Court law because it failed to consider the federal constitutional standard for determining whether Petitioner had a right to confront Melissa Weber and whether that right was violated by the admission of Cellmark's DNA tests as business records. Instead, the state appellate court limited its analysis to the correctness of the state law evidentiary ruling. Thus, the state court erred. However, in order to establish a successful habeas claim, the *result* reached by the state court must be contrary to what would result from the application of the appropriate analysis. In the R&R, Judge Burns considered the merits of Petitioner's Sixth Amendment claim and concluded that the result conflicts with the state court's result. Similarly, it is appropriate for this Court to limit its analysis to this constitutional question.

4. Constitutional Analysis

"The admission of hearsay testimony . . . does not violate the Confrontation Clause, so long as the witness is unavailable and the testimony bears adequate 'indicia of reliability.' Such 'indicia' can be inferred if 'the evidence falls within a firmly rooted hearsay exception.'" *Alcala v. Woodford*, 334 F.3d 862, 881 (9th Cir. 2003) (citing *Ohio v. Roberts*, 448 U.S. 56, 65, 66 (1980)). Accordingly, business records and other evidence that qualify for admission under firmly rooted hearsay exceptions can be admitted in the face of a confrontation clause challenge without additional inquiry into reliability.

Cellmark's DNA tests, however, are not the kind of evidence that qualify as business records so as to satisfy the Sixth Amendment. Judge Burns correctly identified why this is so. (*See* R&R at 35-37.) In *Palmer v. Hoffman*, the Supreme Court held that business records are "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." 318 U.S. 109, 113 (1943). Business records are deemed trustworthy because they are "routine reflections of the day to day operations of a business" and are "record[s] made for the systematic conduct of the business as a business." *Id.* at 113-14. Furthermore, they are generated in the "normal course of business," not for the purpose of litigation or for other self-serving reasons. *See id.* at 111-114.

Unlike business records, the records at issue here were created in anticipation of litigation by Cellmark for the prosecution in Valentine's case. Furthermore, while Cellmark is in the business of producing DNA tests, these records are not "made for the systematic conduct of the

business as a business." *Palmer*, 318 U.S. at 113. Unlike the account books, time cards, files and records of a business, DNA test are highly complicated tests involving numerous complex procedures. The simple fact that it is Cellmark's business to create DNA records does not mean that such records qualify as business records made in the ordinary course of business. Judge Burns quotes an Ohio case that eloquently explains the problem with this assumption:

> If experts were permitted to prepare documentation of their findings and submit the documentation as a business record because, as experts, they prepared the documentation pursuant to their normal course of business, then they would be permitted to introduce a great degree of bias into the proceedings and would never be subject to cross-examination.

(R&R at 35 (quoting *State v. Lane*, 671 N.E.2d 272, 279-80 (Ohio 1995)).)

In *U.S. v. McClintock*, the Ninth Circuit reviewed a district court's decision to admit reports of evaluations of gemstones under the business record exception to the rule against hearsay. 748 F.2d 1278, 1290 (9th Cir. 1984). The defendant objected to the admission as a violation of his right to confront the witnesses against him. *Id.* at 1291. The court concluded that the admission of the evaluations as business records deprived the defendant of his constitutional right to confront witnesses against him. The court held,

> McClintock was denied his sixth amendment right to confront his accusers. The GIA reports of the in-lab evaluations went to an essential element of the case – the quality of the stones sold

> by DDI. The government failed to produce or demonstrate the unavailability of the preparers of the GIA report. Because of the importance of these reports in establishing essential elements of the charged offenses, the evidence contained in them was both crucial to the prosecution and devastating to the defendant. Furthermore, because of the various means of evaluation and apparent subjective decisions that enter into the evaluation of gems, McClintock's confrontation of the preparers of the reports may have been valuable to his defense.

Id. (citations omitted).

Certainly, the tests performed in this case by Cellmark are just as complex, and the evaluations as subjective, as the evaluations of gems at issue in *McClintock*. As Judge Burns correctly notes, and Respondent does not dispute, "DNA tests are highly sensitive, highly complex tests which require sophisticated scientific interpretations." (R&R at 35.)

Without the testimony of Melissa Weber, the reliability of these records cannot be established. The complexity of these records are exactly what makes access to Melissa Weber necessary. The procedures employed by Ms. Weber in the DNA testing in this case involved twenty-four or twenty-five separate steps. (Lodgement No. 1, Vol. 14 at 2554.) While DNA profiling has been held to be reliable as a science, the specific procedures employed by the scientist in this case are not inherently reliable. It is into these aspects of the testing that Valentine had the right to inquire because of their subjectivity and uncertainty.

Under *Palmer* and its progeny, these records do not qualify as a firmly rooted exception to the rule against

hearsay. The prosecution should not have been allowed to rely on this exception to establish the indicia of reliability necessary to avoid a confrontation clause problem. The Court finds that the state court violated Valentine's Sixth Amendment right to confront witnesses against him when it admitted Cellmark's DNA tests into evidence without permitting him to cross-examine the scientist who made the records. The R&R correctly concluded that the state court's ruling was an unreasonable application of clearly established Supreme Court law.

Denying Valentine his Sixth Amendment right of confrontation constitutes a due process violation that may justify habeas relief if the error was not harmless. *Delaware v. Van Arsdall*, 475 U.S. 673, 681-84 (1986). However, the Court finds that the R&R correctly concluded that "the Court cannot say with sufficient certainty that the Sixth Amendment violation by itself had a substantial and injurious effect on the jury's verdict." (R&R at 40.)

D. The Cumulative Effect of the Three Errors

In the R&R, Judge Burns concluded that while none of the identified errors individually had a substantial and injurious effect on the verdict, the three taken together "are significant enough to place the Court in grave doubt about the likely effect of the errors on the jury's verdict." (R&R at 89.)

Judge Burns found that three rulings of the state court were contrary to, or an unreasonable application of, clearly established Supreme Court law. The Court has reviewed Judge Burns' determination above and agrees with his conclusion of law on these three matters. These errors include: (1) the admission of Valentine's post-arrest,

pre-*Miranda* silence as substantive evidence of guilt and the giving of an adoptive admission jury instruction in conjunction with that evidence; (2) the restriction on the cross-examination of Detective Donaldson with regard to his post-arrest jail visit to Valentine; and (3) the admission of DNA test result evidence as business records.

Respondent argues that Judge Burns' finding of cumulative error is incorrect because the admission of silence as evidence of guilt was not contrary to any United State Supreme Court case. (Resp't Objections at 14-15.) For the reasons discussed above, the Court agrees with Judge Burns that the admission of the silence as evidence of guilt was an unreasonable refusal to extend clearly established legal precedent to a context where it should apply. Respondent also claims that all three of the errors identified above were "reasonably decided by the state courts." (Resp't Objections at 15.) The Court details above the reasons for its conclusion that the state court's decisions on these three issues were not reasonable applications of Supreme Court law.

Respondent's next critique of the cumulative error finding is that the DNA test and Detective Donaldson errors were "at best, minuscule." (*Id.*) Respondent argues that "the jury already knew Detective Donaldson went to Petitioner's cell two days after the confession and tape recorded their conversation. It also knew the tape recorder was turned off for five minutes and the detective testified he could not remember what was discussed during that time." (*Id.*) With respect to the admission of the Cellmark DNA tests, Respondent states, "any error in confrontation of the DNA could not have had any significant effect on the jury's verdict in view of the fact that the San Diego expert who tested the stains testified and was cross-examined

and there was extensive cross-examination of Dr. Wood [sic]." (*Id.*)

While the impact of any one of these errors may not have been enough to alter the jury's verdict, the three together may have altered the balance in this complex case. Valentine's defense was based on his alternative explanation of the source of the DNA evidence and on his assertion that Detective Donaldson fabricated his confession. The confession and DNA evidence were the strongest pieces of evidence offered against Valentine. The rulings at issue here significantly impeded Valentine's ability to challenge the most damaging evidence introduced against him. He was precluded from presenting evidence, and attacking evidence in ways, that may have lent more credibility to his defense theory. Moreover, by allowing the jury to erroneously believe that his silence was evidence of his guilt, the state court further undermined Valentine's defense. If the jury was allowed to interpret Valentine's silence as an admission of guilt, it was much more likely to credit the alleged confession made a day after this first "admission."

The Supreme Court has held that where "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error" this constitutes "grave doubt." When a judge has grave doubt about the impact a constitutional error had on a jury, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (citations omitted). The Court agrees with Judge Burns that the three errors taken together "are significant enough to place the Court in grave doubt

about the likely effect of the errors on the jury's verdict." (R&R at 89.) Accordingly, for the reasons set forth above, the petition is **conditionally GRANTED** unless the State decides on or before **March 15, 2004**, to retry Petitioner.

IV. Petitioner's Objections

While the R&R recommends granting Valentine's petition, it finds the majority of his claims meritless. Valentine has objected to these findings. These objections will be addressed below.

A. The Voluntariness of Valentine's Alleged Confession

In his petition, Valentine argued that his confession was inadmissible because it was involuntary. When Valentine asked Detective Donaldson, "I want to tell you something. Can it be used against me?" Donaldson responded, "Well, you asked for a lawyer, but you can tell me if you want." Valentine claimed that this statement mislead him into believing that he could speak without repercussions. (R&R at 41.) He claims that he was, therefore, induced to speak by fraud. (Pet'r Objections at 1.)

Judge Burns concluded that "the state court's determination that Donaldson's response did not overcome Valentine's free will is not contrary to, nor an unreasonable application of, clearly established Supreme Court law." (R&R at 45.) The state court correctly identified the Supreme Court law governing involuntary confessions. Under this body of law, "coercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S.

157, 167 (1986). Judge Burns correctly found that "the Supreme Court has required a high level of coercion in order to render a confession involuntary." (R&R at 44 (citing *Mincey v. Arizona*, 437 U.S. 385 (1978); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968); *Beecher v. Alabama*, 389 U.S. 35 (1967)).)

Moreover, the Court agrees with Judge Burns' finding that the state court examined all the circumstances surrounding Valentine's confession, as mandated by the Supreme Court. (R&R at 45 (citing *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973).) After doing so, the state court concluded that the police conduct, while not exemplary, did not overcome Valentine's free will. (Pet. Ex. A at 15 (holding "although Donaldson's reply can be characterized as ambiguous and/or evasive – a simple 'yes' would have been a correct answer – the reply was not a threat, a promise, or an application of undue influence").) As Judge Burns noted, "this Court may not substitute its judgment for that of the state court." (R&R at 45.) The state court reasonably applied the applicable Supreme Court law, accordingly, Valentine is not entitled to relief on this claim.

B. The Admissibility of Valentine's Alleged Confession Under *Miranda*

Petitioner also challenged the admission of the alleged confession as a violation of his rights under *Miranda*. He argued that Donaldson's response to his question, quoted above, was the functional equivalent of interrogation. This "interrogation" occurred after Valentine had invoked his right to counsel, and, therefore he claims, violated his *Miranda* rights. The state appellate court concluded that Valentine's *Miranda* rights were not violated. (Pet. Ex. A

at 25-26.) Judge Burns concluded that this decision was not contrary to, nor an unreasonable application of, clearly established Supreme Court law

In his objections to the R&R, Petitioner makes no specific attack on Judge Burns' findings. Rather, he simply refers the Court to the section of his petition addressing this issue. (Pet'r Objections at 2 (stating "Petitioner refers the Court to pp. 23-38 of his original memorandum").)

In the R&R, Judge Burns correctly stated that this Court must defer to the factual findings made by the state court because Valentine has not rebutted them by clear and convincing evidence. (R&R at 46 (citing 28 U.S.C. § 2254(e)(1) (2002).) The only issue regarding Valentine's claim of *Miranda* violation for this Court is whether Donaldson's response to Valentine's question was the functional equivalent of interrogation. (*Id.*) Judge Burns found that the state appellate court did not address this question, rather it assumed that the response was interrogation. (*Id.*) Accordingly he undertook an independent review of the record. (*Id.* at 47)

After reviewing the record in light of *Rhode Island v. Innis*, 446 U.S. 291 (1980), and the relevant Ninth Circuit caselaw, Judge Burns concluded that "Donaldson's response was not sufficiently accusatory or threatening to be interrogation." (R&R at 47.) He also found, "nor did Donaldson play on any particular susceptibility of Valentine's." (*Id.*) Lastly, he concluded that "there is no evidence that [Valentine] was 'unusually disoriented' [when he confessed]." (*Id.* (citations omitted))

The Court has reviewed Judge Burns findings de novo and agrees with the R&R's analysis of this issue. The Court agrees that for the reasons identified by Judge

Burns, the state court's decision that Valentine's *Miranda* rights were not violated was not contrary to, nor an unreasonable application of, clearly established Supreme Court law.

C. The Use of Valentine's Search Warrant Question as Proof of Guilt

After his arrest, Valentine made the following statement to one of the arresting officers, "I don't mean to quibble over details here, but did you have a search warrant?" (Lodgment No.1, Vol. 24 at 4367.) In his petition, Valentine claimed that his due process rights were violated by the trial court when it allowed the prosecution to introduce evidence of his search warrant question as substantive evidence of guilt.

The Supreme Court has held that the invocation of one's Fifth Amendment rights cannot be used against him or her as evidence of guilt. *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976). The Ninth Circuit has extended this rule to protect a defendant's invocation of Fourth Amendment rights as well. *See United States v. Prescott*, 581 F.2d 1343, 1349 (9th Cir. 1978); *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976). A number of other federal courts have similarly extended the *Griffin/Doyle* rule. (*See* R&R at 53). As Judge Burns correctly identified, "the question the Court must answer is whether the state court unreasonably applied *Griffin* and *Doyle* by failing to extend those cases to Valentine's Fourth Amendment question." (R&R at 53.)

Judge Burns found that the cases that apply *Griffin* and *Doyle* to Fourth Amendment rights are distinguishable from Valentine's case. In those cases, there was an

actual invocation of a defendant's Fourth Amendment rights, whereas here, "Valentine's question . . . was not an express invocation of his Fourth Amendment rights. Rather, it was a question as to whether the government had proceeded through the proper constitutional channels, had gathered enough evidence to establish probable cause, and whether they had obtained a search warrant." (*Id.*) Valentine's question came after the search at issue and therefore appears to be an intellectual or legal inquiry rather than an invocation of a right prior to an invasion.

Moreover, it is not clear that the statement was admitted as evidence of guilt, as Valentine claims. Judge Burns noted that, in fact, "the jury was instructed that 'Mr. Valentine's statement regarding a search warrant was admitted for the purpose of placing the conversation in context' and that they could consider such evidence for that limited purpose only." (R&R at 53-54).

The statement at issue was not an actual invocation of a constitutional right and the jury was instructed that it could not consider the statement as evidence of guilt. These facts distinguished the circumstances of Valentine's case from those of the cases where the *Griffin/Doyle* principal has been applied to an invocation of a Fourth Amendment right. Accordingly, the Court finds that Judge Burns correctly concluded that Valentine is not entitled to relief based on this claim. (*See* R&R at 54.)

D. The Testimony of Investigator Manny Lopez

At trial, Petitioner was denied the opportunity to present the testimony of Investigator Manny Lopez. Petitioner claims that Mr. Lopez's testimony would have established that "the smearing of a single drop of blood

was consistent with the appearance of the stain on the steering wheel and gear shift knob [of the Valentines' truck] found by police." (Pet'r Objections at 3.) This testimony, Petitioner claims, was relevant to a critical thread of Petitioner's defense: the blood of Petitioner's father found on the steering wheel and gear shift knob came not from Petitioner after the murders but from a cut sustained by Petitioner's father a week earlier. (*Id.*) In his objections, Petitioner restates the argument made in his original petition. He claims that the trial court's failure to let him present this witness violated his Fifth and Sixth Amendment rights to present evidence. (*Id.*)

"The defendant's general right to present evidence is undeniably strong; yet the states' legitimate interest in reliable and efficient trials is also compelling." *Perry v. Rushen*, 713 F.2d 1447, 1451 (9th Cir. 1983). The Ninth Circuit has identified five factors that should be considered when deciding whether a court's exclusion of defense evidence violates the Constitution: "(1) the probative value of the excluded evidence on the cental issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the defense." *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). These factors establish the importance of the evidence, which must then be weighed against the state's interest in exclusion. *Tinsley*, 895 F.2d at 530. To overcome the state's strong interest in the administration of its trials, the circumstances of exclusion must be "unusually compelling." *Perry*, 713 F.2d at 1452.

Judge Burns applied the *Tinsley* factors to the exclusion of Valentine's proposed evidence and found that they

weighed in Valentine's favor. (R&R at 66.) Next he concluded that the blood drop evidence was not "the kind of 'unusually compelling' evidence, the exclusion of which would violate due process." (*Id.*) Judge Burns found that "the jury was capable of determining on its own, using common sense and experience how far one drop of blood could be spread. Moreover, the blood drop evidence did not 'necessarily exonerate' Valentine." (*Id.* at 66-67.) For the reasons identified by Judge Burns, the Court agrees that the exclusion of the evidence did not violate due process and, therefore, the state court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court law.

E. Cumulative Effect of Erroneous Trial Court Rulings and Prosecutor Misconduct

In his petition, Valentine identified a number of trial court rulings and acts of the prosecutor that he claims had the cumulative effect of denying him a fair trial. In the R&R, Judge Burns addressed each of these identified acts and concluded that while some mistakes were made, they were not severe enough to deprive Valentine of his due process rights. In objection, Valentine simply states, "Instead of a proceeding based upon evidence designed to permit fair result, petitioner was tried on irrelevant evidence, denied the right to present critical and material evidence and subjected to a barrage of error and misconduct that, taken as a whole denied him a fair trial." (Pet'r Objections at 3-4.) This vague and general objection implicates a large section of the R&R's analysis. Valentine fails to identify any particular analysis or finding that he finds erroneous. Accordingly, the Court will not reproduce here the thirty pages of Judge Burns' report that address

these various claims of error. The Court has reviewed the R&R's conclusions of law de novo and finds that the R&R accurately states and applies the relevant legal standards. Petitioner is not entitled to relief based on this claim.

F. The Refusal to Instruct on the Reliability of Valentine's Confession

At trial, the judge refused to give the jury a defense-crafted instruction telling them they could consider the circumstances surrounding Valentine's confession in evaluating its voluntariness. In his Petition, Valentine claimed that this ruling violated his due process rights. Judge Burns concluded that Valentine is not entitled to relief on this claim. (R&R at 86.)

Once again, Petitioner fails to make any specific objections to the R&R's findings. Rather, he refers the Court to the arguments put forth in his original petition. (Pet'r Objections at 5 (stating, "[t]he Respondent [sic] incorporates by reference pp. 38-42 of his Memorandum.) He fails to state any objections to Judge Burns' analysis, making it impossible for the Court to discern whether he objects to factual findings or legal conclusions. After conducting a de novo review of the legal issues presented, the Court adopts Judge Burns' conclusions.

Judge Burns concluded first that *Crane v. Kentucky*, 476 U.S. 683 (1986) does not explicitly require that a state trial court give a specific instruction directing the jury to consider the circumstances surrounding a confession to determine its reliability. Rather, he explained, the holding of *Crane* was that a defendant has a right to present evidence regarding the reliability of his confession. (R&R

at 84 (citing *Crane*, 476 U.S. at 690).) The Court agrees with this statement of the *Crane* holding.

Henderson v. Kibbe is the case that supplies the standard for review of an instructional error in habeas cases, which is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." 431 U.S. 145, 154 (1977). Judge Burns concluded that, even if the state court erred by not giving the instruction, this error did not constitute a due process violation because the jury was well-aware that the voluntariness of Valentine's confession was a central issue in the case. (R&R at 86.) To support this finding, Judge Burns cited the numerous times the issue of voluntariness was brought up both by the defense and prosecution. (*Id.*) In his examination of witnesses and arguments made to the jury, the defense repeatedly and forcefully attempted to discredit the confession. (*Id.*) Moreover, the jury was instructed that they had to determine whether the statement was actually made and whether it was true in whole or in part. (*Id.*) As Judge Burns noted, "There is no question that the credibility and reliability of Valentine's confession was a central issue which jurors had to decide." (*Id.*) The Court agrees with Judge Burns' conclusion that given these facts, the failure to give the instruction here did not so infect the entire trial that Valentine's conviction violated due process. The R&R correctly concluded that Valentine is not entitled to relief on this claim.

V. Conclusion

For the reasons set forth above, the Court **ADOPTS** the R&R in its entirety. The cumulative impact of the constitutional errors made by the state court in Valentine's

case is significant enough give this Court grave doubt about the effect it had on the jury verdict. For the reasons stated in the R&R, which are incorporated herein by reference, the petition is **conditionally GRANTED** unless the State decides on or before **March 15, 2004**, to retry Petitioner.

IT IS SO ORDERED.

Dated: January 6, 2004

/s/ Napoleon A. Jones, Jr.
NAPOLEON A. JONES, JR.
United States District Judge

cc: Magistrate Judge Ruben B. Brooks
All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE — Case Number: 3:01-cv-00681

Valentine – PLAINTIFF — (Filed Jan. 8, 2004)

v.

Alameida – DEFENDANT

___ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT
the report and recommendation is adopted in its entirety. The petition is conditionally granted unless the State decides on or before March 15, 2004 to retry Petitioner. . . .

1/8/04
Date

/s/ W. Samuel Hamrick, Jr.
Clerk

[Illegible]
Entered on 1/8/04

pre – Jones
ref – Brooks

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALEXANDER VALENTINE, Petitioner, vs. EDWARD S. ALAMEDA, Jr., Director, et al., Respondents.	Civil No. 01-0681 J (LAB) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE GRANT OF PETITION FOR WRIT OF HABEAS CORPUS** (Filed Jul. 9, 2003)

I. INTRODUCTION

Petitioner Alexander Valentine has filed a habeas corpus petition in this Court, challenging his San Diego Superior Court conviction in case number SCD122660 pursuant to 28 U.S.C. § 2254. In his petition, Valentine alleges that: (1) his Fifth Amendment rights were violated by the admission in evidence of an involuntary confession; (2) his Fifth Amendment rights were violated by the admission in evidence of a confession which was obtained without a knowing and voluntary waiver of his *Miranda* rights; (3) his Fifth Amendment rights were violated by the state trial court's failure to instruct the jury to evaluate the reliability of his confession; (4) his federal due process rights were violated by the admission in evidence of the fact that he asked police officers whether they had a search warrant; (5) his Fifth Amendment rights were violated by the admission of his post-arrest, pre-*Miranda* silence as substantive evidence of his guilt; (6) his Sixth Amendment rights were violated by the admission of DNA testing evidence as business records; (7) his due process rights were violated by the state trial court's refusal to

give a jury instruction on the burden of proof as it related to third party liability; (8) his due process rights were violated by the state trial court giving an instruction on adoptive admissions; (9) his due process rights were violated by the cumulative effect of several incorrect evidentiary rulings; and (10) the prosecutor committed prosecutorial misconduct. (*See* Pet. & Peers P.&A.)

This Report and Recommendation is submitted to United States District Judge Napoleon A. Jones, Jr., pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California. The Court has considered the Petition, Petitioner's Memorandum of Points and Authorities, Respondent's Answer and Memorandum of Points and Authorities, Petitioner's Traverse, Petitioner's Citation of Additional Authority, as well as all the supporting documents submitted by the parties. Based upon the documents and evidence presented in this case, and for the reasons set forth below, the Court recommends that the Petition be **GRANTED**.

II. STATE COURT PROCEEDINGS

On September 26, 1996, the San Diego County District Attorney filed an information charging Valentine with the murders of his parents, Diane and Kenneth Valentine, in violation of California Penal Code section 187(a). (Lodgment No. 2, Vol. 1 at 0001-0002.) The information also charged Valentine with personal use of a deadly and dangerous weapon as to each murder, in violation of California Penal Code section 12022(b)(1), and contained a special circumstance allegation pursuant to California Penal Code section 190.2(a)(3). In pretrial proceedings,

Valentine filed two motions to suppress evidence. In the first motion, Valentine sought to suppress several of his statements. (*Id.* at 0063-0077.) In the second motion, Valentine sought to suppress evidence gained from the searches of a truck outside the Valentine residence, the Valentine residence itself, and Diane Valentine's business, as well as all evidence obtained as a result of Valentine's alleged illegal arrest. (*Id.* at 0078-0142.) The motions to suppress were denied. (Lodgment No. 1, Vol. 5 at 915-27.)

After a jury trial, Valentine was found guilty of second degree murder of his mother and first-degree murder of his father. (Lodgment No. 1, Vol. 6 at 1128-29.) The jury found that Valentine had personally used a deadly and dangerous weapon in each murder, and also found the special circumstance allegation to be true. (*Id.* at 1128-30.) Valentine was sentenced to life without parole for the murder of his father, and fifteen years-to-life for the murder of his mother, to be served concurrently. He was also sentenced to one year for the personal use of a deadly weapon, to be served concurrently. (Lodgment No. 2, Vol. 6 at 1283.)

Valentine appealed his conviction to the California Court of Appeal for the Fourth District, raising the same claims as he raises in the instant petition. (Pet., Ex. A.) The Fourth District Court of Appeal affirmed the conviction. (*Id.*) Valentine then filed a petition for review with the Supreme Court of California, arguing the same claims. (*Id.* at Ex. B.) That Court denied the petition without citation of authority on April 19, 2000. (*Id.*)

III. FEDERAL COURT PROCEEDINGS

Valentine filed his Petition for Writ of Habeas Corpus and accompanying Memorandum of Points and Authorities in this Court on April 18, 2001. The Attorney General filed an Answer and Notice of Lodgment on August 9, 2001. Valentine filed a Traverse on September 25, 2001, and a document entitled "Petitioner's Citation of Additional Authority" on November 2, 2001.

IV. STATEMENT OF FACTS

As amended, 28 U.S.C. § 2254(e)(1) provides: "[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.A. § 2254(e)(1) (West Supp. 2002). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.*; *see also Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc) *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997) (stating that federal courts must "give great deference to the state court's factual findings.") Thus, the following facts are taken verbatim from the California court of appeal's opinion in Valentine's direct appeal:

> Valentine is the son of Kenneth Valentine (Kenneth), an engineer who was the chief scientist at Science Applications International Corporation (SAIC), and Diane Valentine (Diane) who owned a water-purification business, Environmental Management. The relationship between Valentine, an only child, and his parents appeared to be excellent.
>
> Valentine graduated from Torrey Pines High School with a 3.76 grade point average in 1995. Test results showed he had an IQ of 142 or 164.

In the fall of 1995, Valentine enrolled in Harvey Mudd College. He failed in his first semester but continued to attend the college under a program in which he would be ineligible to return after the second semester. Valentine did not reveal his academic failure at Harvey Mudd College to his parents, but rather told them he was unhappy there and wanted to transfer to the University of California, Berkeley (UCB). Meanwhile, Valentine applied and was accepted to UCB on a falsified application. UCB rescinded the acceptance on June 24, 1996, after discovering Valentine had lied on his application.

Valentine's parents believed that he was a straight-A student at Harvey Mudd College, and the UCB admission had been withdrawn because of a bureaucratic snafu that could be rectified.

Valentine worked for Diane at Environmental Management during school vacations, including the summer of 1996.

August 2, 1996, a Friday, was Diane's birthday, and Kenneth and she planned to go out to dinner after work. According to people who observed Diane and Valentine at work that day, mother and son interacted normally. At about 4:50 p.m, Michael Sylvester, the United Parcel Service delivery man who also operated a janitorial service, made his daily stop at Environmental Management. Diane told Sylvester there were no UPS packages to be picked up and Sylvester left. Then Diane remembered she wanted Sylvester to make a special effort to remove spider webs in the bathroom. Diane asked Valentine to run outside and tell Sylvester about the spider webs. Valentine caught Sylvester as he was preparing

to drive away and told him to remove the cobwebs when he cleaned. Valentine also asked what time Sylvester would be coming by that night. At first, Sylvester thought the question was odd because no one had ever asked when he would do the cleaning as long as it was done by Monday, but upon reflection Sylvester thought Diane and Valentine were planning to work late that night. Sylvester told Valentine he would be back about 7:30 p.m.

At about 8:50 p.m., Sylvester returned to Environmental Management to clean the office. He noticed Diane's car (a gold Saturn was parked out front, and a red vehicle was next to it. Upon entering the office, Sylvester found the door unlocked, the lights off, and the air conditioner on – all of which were unusual if Diane was working late.

In the warehouse area, Sylvester saw a body face down on the floor with an open head wound and a lot of blood. Partitions had been moved to block access to the back part of the warehouse. Sylvester telephoned 911. Police discovered a second body hidden under a table in the mail room. The first body was Kenneth's; the second was Diane's. Kenneth had injuries to the left side of his head. Diane suffered trauma to the face and had a large open wound on her forehead. Neither had defensive wounds. A blood pattern analyst opined Diane was killed first.

Police ran computer checks on the Saturn and the red vehicle (a Nissan pickup) parked outside and discovered the Valentines – with a residential address of 4080 Arroyo Sorrento Road were the registered owners of the vehicles.[1] [1.

Police also learned a 1987 Dodge truck was registered at that address.]

At about 2 a.m., Detective Joseph Howie arrived at the Valentine residence. As he walked to the front door, Howie saw a blue Dodge Dakota truck that had been backed into the driveway and recognized it as one of the vehicles registered to Kenneth. Howie also noted a dog, locked in the garage, was barking loudly and continuously. Howie knocked on the front door of the house with his flashlight but got no response. Patrol officers secured the perimeter of the residence.

Officer Robert Atwood, stationed near the garage, noticed what appeared to be fresh red blood stains on the steering wheel and gearshift of the blue truck parked in the driveway and reported this to Howie, who looked through the open driver's window and saw the red stains. Howie went to the rear of the house and knocked loudly on a back door and windows with his flashlight while announcing he was a police officer. There was no response. Howie left to obtain a search warrant for the house.

Over the next two and one-half hours, the officers on the scene, including Detective Arturo Campa, the acting sergeant in charge of Homicide Team 6, knocked on the doors and windows of the Valentine residence to no avail. At one point, Campa knocked on a window on the south side of the house and shined his 15,000 candlepower flashlight through it; there was no response. It was later determined to be a window in Valentine's bedroom.

The Valentine residence had two telephone lines, but the numbers were unlisted and could

not be determined. The telephone company established a temporary number to the residence, and, at 4:40 a.m., Campa telephoned the number. After three rings, Valentine answered the phone. Campa told him police officers were outside the house and asked him to come outside. Valentine, who did not ask Campa why the police were there, said he would get dressed and come out.

As Valentine walked out the front door, officers approached him, handcuffed him and placed him in the back seat of Officer Kevin McNamara's patrol car. Detective Max Verduzco heard Valentine say "'What's the problem? What's the problem? I called you. My mom and dad have not come home yet.'"

While waiting in the patrol car, Valentine asked McNamara what was going on; Valentine also said his parents had gone out for his mother's birthday and they had not come home and he was worried about them.

By this time, Howie had returned with a warrant to search the residence. After giving knock-and-notice, Howie and three other officers did a protective sweep of the residence looking for other people; they found none. After the sweep, Detective Robert Donaldson approached Valentine in the car and told him he was under arrest for murder. Valentine did not respond.

However, while being driven to police headquarters by McNamara, Valentine said he did not know what Donaldson was talking about when he placed him under arrest for murder. Valentine also said: "'My parents are dead, aren't they?'" The conversation was surreptitiously tape recorded by McNamara, and the tape was played

for the jury. As McNamara was driving away from the residence, Valentine said: "'I don't mean to quibble over details here, but did you have a search warrant?'"

At 6 a.m., Donaldson and Verduzco moved Valentine from a holding cell to an interview room. Donaldson advised Valentine of his Miranda rights, and Valentine said he understood each right and requested an attorney. Donaldson and Verduzco returned Valentine to the holding cell.

At 7:45 a.m., a forensic specialist arrived, and routine processing of Valentine began, including the collection of hair, blood and urine samples. Donaldson and Verduzco did not talk to Valentine except to give him instructions. Valentine was "calm" during the procedure.

At about 10:15 a.m., Donaldson and Verduzco transported Valentine to the jail in an unmarked car to avoid the media. There was no screen or partition separating the front seat from the back seat. Donaldson drove, with Verduzco sitting directly behind him in the back seat and the handcuffed Valentine sitting in the back seat behind the front passenger seat. The detectives had placed their guns and briefcases in the trunk for security reasons.

For about 14 blocks, no one said anything. Then about two blocks from the jail, Valentine started crying, stomping his feet, and hitting his head against the passenger seat. Valentine asked Donaldson to pull over. Valentine said: "'I want to tell you something. Can it be used against me?'" Donaldson relied: "'[Y]ou asked for a lawyer, but you can tell me if you want.'"

Donaldson, who had put his tape recorder in the trunk of the car, began writing down what Valentine said. According to Donaldson's notes, Valentine said:

> "'All right, I've lost everything. This wasn't supposed to happen. It was a mistake. It had nothing to do with my mother's birthday.
>
> "I flunked out at Harvey Mudd College and I got rejected from U.C. Berkeley. I'm a piece of shit.
>
> "My mother was going to tell my father how worthless I really am. She was going to kick me out of the house. I couldn't stand it any more or live up to their expectations. They always said how smart I was but I was faking it in school.
>
> "I used a pipe wrench. I hit her in the head. I lost it. I took it with me. My clothes, and I think the pipe wrench, I put in a box and put them in a dumpster behind the AMC 6 Theaters at the Weigand Plaza shopping center.
>
> "I deserve to die. My father was an accident. He wasn't supposed to be there. I had to hit him. I didn't want him to find out what a piece of shit I really am.
>
> "I've never been close to anyone in my life. My girlfriend was the first one I cared about. We were going to get married, but now I messed that all up. I just want to die. I want to die. I'll be found guilty. I know it."

Nothing further was said by any of the occupants of the vehicle as the detectives proceeded to take Valentine to the jail.

At 11:25 a.m., police searched the dumpster at the AMC 6 theaters in the Weigand Plaza shopping center for the murder weapon and Valentine's clothes but found no evidence. According to the trash company's schedule, the dumpsters would have been emptied into a refuse truck after 6 o'clock that morning and the contents of the truck dumped at the county landfill before 10 a.m.

The San Diego Police Department's Crime Laboratory conducted DNA testing of various items of evidence using PCR DQ-Alpha polymarker tests. The blood evidence on the Dodge truck key, steering wheel and gear shift were consistent with Kenneth's DNA. A stain on a shirt found in a clothes hamper tested consistent with Kenneth's DNA. Jeans taken from the hamper had separate stains with both Kenneth's and Valentine's DNA. A stain from the bathtub and bath mat in Valentine's bathroom tested consistent with Kenneth's DNA. The frequency rates for the finding were that the rarity of a PCR DQ-Alpha polymarker match to Kenneth's DNA would be 1 in 1,300 in the Caucasian population, 1 in 43,000 in the African-American population and 1 in 5,600 in the Hispanic population.

Cellmark Diagnostics (Cellmark) did further testing using the restriction fragment length polymorphism (RFLP) test and the product rule statistical methodology. The blood stain on the gearshift knob matched Kenneth's DNA with a frequency of 1 in 310 million in the Caucasian population, 1 in 1.2 billion in the African-American

population and 1 in 140 million in the Hispanic population

Cellmark also performed a type of PCR test called Short Tandem Repeat (STR), which sampled different genetic regions than the six DQ-Alpha polymarker test areas that were used by the San Diego police lab. The STR tests showed Kenneth's DNA was consistent with the stain on the key, the steering wheel and shirt. Combining the police lab data and the STR results, the estimate of the rarity of a match was 1 in 630,000 in the Caucasian population, 1 in 41 million in the African-American population and 1 in 1.7 million in the Hispanic population.

Testifying in his own defense, Valentine denied killing his parents. He left Environmental Management around 5 p.m.[2] [[2] David Wagner, who worked in the same building complex, identified Valentine as the individual he saw driving out of the parking lot just before 5 p.m. after giving him "'weird look'" as if he was jammed in by Wagner's jeep and his friend's truck.] on August 2 and arrived home between 5:45 and 6 p.m. His grandmother, Irene Davis, called several times during the evening and they discussed concern over Kenneth and Diane not coming home. Valentine called the police at 10:01 p.m., asking if there had been any automobile accidents in the area.[3] [[3] Officer McNamara testified Valentine had told him he had called the police about 9 p.m. because he was worried that his parents had not yet come home.] He called back his grandmother and related there had not been any accidents reported. Valentine and his grandmother talked again one or two hours later, and both of them were getting worried. Davis called Valentine between 1 and 1:30 a.m. Valentine

then took two melatonin pills, turned on the fan and air filter in his room and fell asleep. He was awakened by the police telephone call and went outside.

Valentine testified that during processing at the police station, Donaldson "kept telling me . . . they were just here to help me and that anything I told them, it was okay, that all they were here to do is help me and anything that I told then would just help me out." Donaldson asked him about a tool board at the Environmental Management office and Valentine said it had a big pipe wrench, among other items. Donaldson also asked if he had a girlfriend and Valentine mentioned his girlfriend, saying she was "'the first one I really cared about' and on their first date they went to the movies at the AMC 6 theaters in the Weigand Plaza shopping center.

While en route to the jail Donaldson told Valentine the penalty for double homicide was "'either life without parole or death.'" The detectives kept encouraging Valentine to tell them what had happened or "let it out," saying he would feel better because "[i]ts got to be eating at . . . you." The detectives assured Valentine his comments would be "off the record."

Valentine testified Donaldson pulled the vehicle over on his own initiative and said "'You've got to feel something right now. It's got to be just driving at you. Just tell us what's going on inside of you.'" Valentine was upset and crying, and said: "'Look, all right, I've lost everything, okay? I don't know what's happening to me. I just . . . wish I were dead right now. I've lost everything that's important to me. I don't understand why this is happening.'" Valentine also said he could

never live up to his parents' expectations, had failed at Harvey Mudd, and had been rejected by UCB. Valentine denied make [sic] the incriminating statements attributed to him by the detectives.

To explain the presence of Kenneth's blood on certain items, Valentine testified that Kenneth had cut his finger on a nail while moving furniture at Environmental Management during the last weekend in July and then drove the Dodge pickup truck home. Also, while Valentine was away at school, Kenneth had begun using Valentine's bathroom because Diane was sensitive to Kenneth's shampoo and aftershave. Kenneth sometimes wore Valentine's old jeans while doing yard work.[4] [[4] Both Kenneth and Valentine had a waist size of 36. However, Kenneth was five feet, eight inches tall, and Valentine is six feet, one inch tall.]

The defense also presented evidence that a third party, Robert Newsome, may have killed Diane and Kenneth. Newsome sold water filtration products for Environmental Management as an independent contractor. He and Diane were constantly bickering about client lists and commissions.

On the morning of August 2, Diane told Newsome over the telephone that unless he faxed a current project list to her he would not receive credit for any of them and she did not want him to be representing her company anymore. When he replied it was impossible to satisfy her request, she became upset and yelled at him.

That afternoon Diane telephoned the assistant regional sales manager for the manufacturer of water purification systems Newsome sold for Environmental Management and told him she had fired Newsome. Diane also told the sales manager she was "physically afraid" of Newsome.

When Newsome went home at 3 p.m., he learned Diane had left a message that he had been "relieved of all accounts." Newsome called Environmental Management to speak with Diane at 3:35 p.m. and again at 4:55 p.m. Valentine answered the phone both times and, acting on Diane's instructions, told Newsome she was not there. Newsome, who believed Diane might be in the office, sent her a fax at 5:21 p.m. threatening a lawsuit.[5] [[5] The fax read in part: "Unless I hear from you today that you are going to work with me on the above mentioned case, I will begin legal action against you and Environmental Management the first of next week regarding this and other accounts. . . . I suggest you regain your sense of fairness and professionalism before you are involved in serious litigation that only your attorney will enjoy."]

Newsome denied having anything to do with the killings.

(Pet. at Ex. A, 2-14.)

V. SCOPE OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an

> application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in *violation of the Constitution or laws or treaties of the United States.*

28 U.S.C. § 2254(a) (West 1994) (emphasis added).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to habeas corpus petitions filed after 1996. *See Lindh v. Murphy,* 521 U.S. 320 (1997). The current petition was filed on April 9, 2002, and is governed by the AEDPA. As amended, 28 U.S.C. § 2254(d) now reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1)-(2) (West Supp. 2003).

To obtain federal habeas relief, Petitioner must satisfy either § 2254(d)(1) or § 2254(d)(2). *See Williams v. Taylor,* 529 U.S. 362, 403 (2000). The Supreme Court interprets § 2254(d)(1) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; *Lockyer v. Andrade*, ___ U.S. ___, 123 S. Ct. 1166, 1174-75 (2003).

The Ninth Circuit recently reaffirmed the primacy of United States Supreme Court law in this determination:

> The *only* definitive source of clearly established federal law under AEDPA is the holdings (as opposed to the dicta) of the Supreme Court at the time of the state court decision. *Williams*, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, *Van Tran*, 212 F.3d at 1154; *Duhaime v. Ducharme*, 209 F.3d 597, 600-01 (9th Cir. 1999), "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *Van Tran*, 212 F.3d at 1154 (quotations in original omitted).

Clark v. Murphy, 317 F.3d 1038, 1044 (9th Cir. 2003) (overruled on other grounds by *Lockyer*, 123 S. Ct. at 1172).

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision. *Ylst v. Nunnemaker,* 501 U.S. 797, 801-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis,* 223 F.3d 976, 982 (9th Cir. 2000) (overruled in part by *Lockyer,* 123 U.S. at 1174-75). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *Early v. Packer,* 537 U.S. 3, ___, 123 S. Ct. 362, 365 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]" *id.*, the state court decision will not be "contrary to" clearly established federal law.

VI. DISCUSSION

After a thorough analysis of the pleadings and lodgments submitted by the parties, as well as the relevant legal authority, the Court concludes that the state appellate court's adjudication of three of Valentine's claims was contrary to, or an unreasonable application of, clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d)(1); *Williams,* 529 U.S. at 412-13. The Court also concludes that the cumulative effect of these errors had a substantial and injurious effect on the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1992).

A. Fifth Amendment Violation – Admission of Valentine's Post-Arrest, Pre-*Miranda* Silence and the Adoptive Admission Instruction

Valentine claims the trial court committed constitutional error by permitting the prosecution to use his post-arrest, pre-*Miranda* silence as substantive evidence of his guilt. Moreover, Valentine maintains that this error was compounded by the trial court's giving a jury instruction pertaining to "adoptive admissions," which both highlighted the erroneously admitted evidence and directed the jurors to consider Valentine's post-arrest silence as substantive evidence of his guilt. (*See* Pet'rs P. & A. at 42-52, 64-66.)

1. Use of Valentine's silence as evidence of guilt

Valentine first argues that the prosecutor's use of his silence in the face of Detective Donaldson's accusation, "You are under arrest for murder" as substantive evidence of his guilt violated his Fifth Amendment rights. In the prosecutor's case-in-chief, on direct examination of Detective Donaldson, the prosecutor elicited testimony from Donaldson regarding Valentine's silence after Donaldson informed Valentine that he was under arrest for murder. Defense counsel objected to this testimony on constitutional grounds:

> Q. What did you tell the defendant at that time?
>
> A. I told him he was under arrest for murder.
>
> Q. When you told him that he was under arrest for murder, did you tell him the number of victims?

A. No.

Q. Did you tell him the names of the victims?

A. No.

Q. When you told the defendant that he was under arrest for murder, did he respond?

A. Not at all.

Q. He didn't ask whose murder he was being placed under arrest for or why?

MR. IREDALE: Objection as to relevance, Fifth and Sixth Amendments.

MS. BLAIR: Your honor, this is –

THE COURT: It's a leading question to boot. Sustained on that ground, at least.

MS. BLAIR: Your honor, I think we need to be heard at sidebar.

THE COURT: I don't need to be heard. Just proceed with your next question.

MS. BLAIR: Thank you.

Q. He said nothing at all, no response at all to that?

MR. IREDALE: Objection as to relevance, Fifth and Sixth Amendments.

THE COURT: Overruled.

THE WITNESS: He said nothing.

(Lodgment No. 1, Vol. 18 at 3430.)

The prosecutor also elicited testimony from Officer McNamara, on direct examination, about Valentine's silence following his arrest by Donaldson:

> Q. What did you hear the detective say?
>
> A. "You're under arrest for murder."
>
> Q. Did the detective say the number of murders or who was murdered?
>
> A. No, ma'am.
>
> Q. Did the defendant respond at all when he was told he was under arrest for murder by this detective?
>
> A. No, ma'am.

(Lodgment No. 1, Vol. 22 at 4077.)

The prosecutor then argued to the jury that Valentine's silence after being informed that he was under arrest was evidence of his guilt:

> When the defendant was placed under arrest for the murders of his parents, why no questions, no protest? Because he already knew. He knew why they were there. Can you imagine? You're under arrest for murder. No comment whatsoever? No protest? No, "What the hell?" No, "Who was murdered?" No, nothing. He already knew the answer. . . .
>
> . . . .
>
> It just happens that when he's placed under arrest for murder, he says nothing, nothing. "You're under arrest for murder." Silence. The next time he speaks is when he's chitchatting with Officer McNamara about the water tank on

> the hill, and he is not asking who was murdered. He's not asking, "Why am I placed under arrest for murder?" because he knows. He knows why they're there. He just doesn't know how they found out and what they know and he's going to be careful. That evidence is consistent with a guilty person. Can you imagine, if I told you were placed under arrest for murder, and you don't ask questions?

(Lodgment No. 1, Vol. 26 at 4686, 4787.)

Defense counsel moved for a mistrial based on the prosecutor's reference to Valentine's silence upon arrest as evidence of his guilt. (Lodgment No. 1, Vol. 26 at 4809.)

In its analysis of this claim, the state appellate court concluded that because Valentine's silence occurred before the arresting officers had advised him of his *Miranda* rights, no error occurred:

> Although it is an established principle of constitutional law that once an accused has been admonished pursuant to *Miranda*, his or her silence may not be used to impeach an explanation subsequently offered at trial (*Doyle v. Ohio* (1976) 426 U.S. 610, 617-618), this rule of exclusion does not apply if the *Miranda* admonishment has not been given. (*Fletcher v. Weir* (1982) 455 U.S. 603, 605-607; see also *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 244-245 [after Prop. 8, *Doyle* rule applies only to post-*Miranda* silence].) Since Valentine had not been *Mirandized* when Donaldson told him he was under arrest, *Doyle* did not apply. (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842 ["It is thus clear that where *Miranda* warnings have not been given, the federal rule, as announced in

> *Fletcher v. Weir,* governs, and *Doyle* error is not committed by questions or commentary concerning a defendant's post-arrest silence."].)
>
> Evidence of Valentine's silence when Donaldson told him he was under arrest was admissible to impeach or refute Valentine's defense, which essentially was that he did not kill his parents and had no knowledge they were dead.

(Pet., Ex. A at 36-37.)

The state appellate court cited *Doyle v. Ohio,* 426 U.S. 610 (1976) and *Fletcher v. Weir,* 455 U.S. 603 (1982) as support for its determination that the use of Valentine's silence as evidence of guilt did not violate his Fifth Amendment rights. (*See* Pet., Ex. A at 36-37.) However, neither *Doyle* nor *Fletcher* applied the Fifth Amendment in their analysis of the prosecutor's use of a defendant's silence, and both cases addressed the use of a defendant's silence as *impeachment,* not as *substantive evidence of guilt.*

In *Doyle,* the Supreme Court held that permitting a prosecutor to impeach a defendant at trial with his silence offended due process principles:

> Silence in the wake of *Miranda* warnings maybe nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. . . . In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 617-18.

In *Fletcher,* the Court extended *Doyle's* due process rationale to a defendant's post-arrest, pre-*Miranda* silence, holding that due process was not violated by the use of such silence for impeachment. The Court noted that "we have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him." *Fletcher,* 455 U.S. at 603. Because the defendant had not been given his *Miranda* rights, no such inducement had occurred. *Id.*

More importantly, *Doyle* and *Fletcher* addressed the use of a defendant's silence for *impeachment.* In contrast, Valentine maintains that the prosecutor emphasized his post-arrest silence *as substantive evidence of guilt.*[1] Impeachment occurs when evidence is used to call into question the credibility or veracity of a witness's testimony. *See United States v. Savory,* 832 F.2d 1011, 1017 (9th Cir. 1987); Black's Law Dictionary (6th Ed. 1990). At the time the prosecutor elicited testimony from the two police officers about Valentine's post-arrest, pre-*Miranda* silence, Valentine had not testified, and the officer's testimony in the prosecution's case in chief was therefore not impeachment. Thus, the due process analysis as it relates to silence used for impeachment of *Doyle* and *Fletcher* is not the correct "governing legal principle." *See Lockyer,* 123 S. Ct. at 1174-75. Since Valentine's claim involves a Fifth Amendment attack on the use of his silence as substantive evidence of guilt, the "correct

[1] The prosecutor did impeach Valentine with his post-arrest silence when he testified in his own defense. Valentine does not claim, nor could he claim, a violation of his Fifth Amendment rights with respect to those actions. *See Fletcher,* 455 U.S. at 603.

controlling authority" is the Supreme Court's Fifth Amendment jurisprudence.

In *Griffin v. California,* 380 U.S. 609 (1965), the Supreme Court held that "the Fifth Amendment ... forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615. The *Griffin* Court based its holding on the principle that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614 (citations omitted). While the Court has held that the Fifth Amendment does not bar the use of a defendant's silence for *impeachment* purposes, *see Fletcher,* 455 U.S. 603 and *Jenkins v. Anderson,* 447 U.S. 231 (1980), the *Jenkins* Court acknowledged that the use of such silence as *substantive evidence of guilt* poses an entirely different question. *Id.* at 236, n.2 ("Our decision today does not consider whether and under what circumstances pre-arrest silence may be protected under the Fifth Amendment.").

Although the Supreme Court has not directly confronted the question whether a defendant's post-arrest, pre-*Miranda* silence may be used by the prosecution as substantive evidence of guilt, eight circuits, including the Ninth Circuit, have concluded that the Fifth Amendment's protections extend to either pre-arrest or post-arrest, pre-*Miranda* silence.[2] *See United States v. Caro,* 637 F.2d 869,

[2] In addition, the California Court of Appeal for the Second District, Division Seven, also recently arrived at the same conclusion in

(Continued on following page)

876 (2nd Cir. 1981) (assuming, without deciding, that prosecutor's use of defendant's pre-arrest and post-arrest, pre-*Miranda* silence as evidence of guilt violates the Fifth Amendment); *United States v. Savory,* 832 F.2d 1011, 1017 (7th Cir. 1987) (holding that prosecution's use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment); *Coppola v. Powell,* 878 F.2d 1562, 1568 (1st Cir. 1989) (same); *United States v. Burson,* 952 F.2d 1196, 1201 (10th Cir. 1991) (same); *United States v. Zanabria,* 74 F.2d 590, 593 (5th Cir. 1996) (assuming, without deciding, that prosecutor's use of defendant's pre-arrest silence as evidence of guilt violates the Fifth Amendment); *United States v. Moore,* 104 F.3d 377, 385 (D.C. Cir. 1997) (holding that prosecution's use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment); *Combs v. Coyle,* 205 F.3d 269, 282 (6th Cir. 2000) (holding that prosecution's use of pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment); *United States v. Whitehead,* 200 F.3d 634, 638 (9th Cir. 2000) (holding that prosecution's use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment); *United States v. Velarde-Gomez,* 269 F.3d 1023, 1028-30 (9th Cir. 2001) (same); *but see United States v. Rivera,* 944 F.2d 1563, 1568 (11th Cir. 1991) (holding that "the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given.").

In *Moore,* the D.C. Circuit Court found that *Griffin* and *Miranda* compelled a holding that the prosecution's use of defendant's post-arrest, pre-*Miranda* silence in its

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People v. Cleland, 109 Cal. App. 4th 212 (2003) (as modified on denial of rehearing, June 16, 2003).

case [illegible]hief violated the Fifth Amendment. The Court quote[illegible]*iranda* as standing for the proposition that "'the prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation' when he was 'under police custodial interrogation.'" *Moore,* 104 F.3d at 384-85. Moreover, the D.C. Circuit Court found that the Supreme Court has given a defendant's Fifth Amendment privilege broad scope:

> [T]he Supreme Court, in *Miranda* among many other decisions, has made it clear that the protection [against self-incrimination extends backward at least to the time of custodial interrogation.
>
> Although in the present case, interrogation per se had not begun, neither *Miranda* nor any other case suggests that a defendant's protected right to remain silent attaches only upon the commencement of questioning as opposed to custody. While the defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it. Prosecutorial comment upon that assertion would unduly burden the Fifth Amendment privilege. . . . We therefore think it evident that custody and not interrogation is the triggering mechanism for the right of a pretrial silence under *Miranda.*

Moore, 104 F.3d at 385.

Similarly, in *Savory,* the Seventh Circuit noted that there is a fundamental difference between the use of a defendant's silence for impeachment purposes and as substantive evidence of guilt:

> The cases which have allowed impeachment by silence rely on the fact that the defendant opens himself to impeachment by taking the stand. *See Fletcher,* 455 U.S. at 605-06, 102 S.Ct. at 1311-12; *Jenkins,* 447 U.S. at 235-36 & n.2, 100 S.Ct. at 2127-28 & n.2. There is, on the other hand, a constitutional right to say nothing at all about the allegations. While the presence of *Miranda* warnings may provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition.

Savory, 832 F.2d at 1017-18.

The Ninth Circuit has also held in at least two cases that the prosecution may not use a defendant's post-arrest, pre-*Miranda* silence in its case in chief, relying principally on *Miranda, Griffin* and *Doyle.*[3] In *Whitehead,* the Ninth Circuit held that the prosecutor's use of the defendant's post-arrest, pre-*Miranda* silence constituted a violation of his Fifth Amendment rights because it was an impermissible penalty on that right. *Whitehead,* 200 F.3d at 638-39 (citing *Douglas v. Cupp,* 578 F.2d 266, 267 (9th Cir. 1978). Similarly, in *Velarde-Gomez,* the court found that "evidence of a lack of physical or emotional reaction was tantamount to evidence of silence," and that the prosecutor's use of it in his case in chief violated the defendant's Fifth Amendment rights. *Velarde-Gomez,* 269 F.3d at 1028. The Court reasoned:

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[3] The Ninth Circuit also referenced Justice Scalia's dissent in *Mitchell v. United States,* 526 U.S. 314, 338, n. 2, in which he stated: "[W]e did say in *Miranda v. Arizona* [citation omitted] that a defendant's post-arrest silence could not be introduced as substantive evidence against him at trial."

> The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Cons. amend. V. This right to remain silent carries an "implicit . . . assurance" that silence will carry no penalty. *Doyle,* 426 U.S. at 618, 96 S.Ct. at 2240; *United States v. Foster,* 985 F.2d 466, 468 (9th Cir. 1993); *see also Miranda v. Arizona,* 384 U.S. 436, 438 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation."). Although *Miranda* warnings are required to reduce the risk that suspects subject to the inherent coercion of custodial interrogation will be compelled to incriminate themselves, *see New York v. Quarles,* 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), "[t]he warnings mandated by [*Miranda* are] a prophylactic means of safeguarding Fifth Amendment rights," *Doyle,* 426 U.S. at 617, 96 S.Ct. 2240, – *they are not the genesis of those rights.* Therefore, *once the government places an individual in custody, that individual has the right to remain silent in the face of government questioning, regardless of whether the* Miranda *warnings are given. Id.* Moreover, the government may not burden that right by commenting on the defendant's post-arrest silence at trial. *Griffin v. California,* 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) ("[C]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws.") (citation omitted); *Miranda,* 384 U.S. at 468 n. 37, 86 S.Ct. 1602 ("The prosecution, may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.").

Id. at 1028-29 (emphasis added).

After a thorough analysis of both circuit law and the Supreme Court's Fifth Amendment jurisprudence, the Court concludes that the state court's decision was an unreasonable application of clearly established Supreme Court law because it "unreasonably refuse[d] to extend a [clearly established legal] principle to a new context where it should apply." *Williams,* 529 U.S. at 407. The Court is persuaded that a proper interpretation of clearly established Supreme Court law prohibits the use of a defendant's post-arrest, pre-*Miranda* silence as evidence of guilt at trial.[4] *See Williams,* 529 U.S. at 407; *Duhaime,* 200 F.3d at 600. As the D.C. Circuit Court stated in *Moore*:

> Neither *Doyle* nor any other case stands for the proposition advanced by the prosecution that the defendant's silence can be used against him so long as he has not received his *Miranda* warnings. Logically, none could.
>
> It simply cannot be the case that a citizen's protection against self-incrimination only attaches when officers recite a certain litany of rights. The Supreme Court's purpose in requiring the arresting authorities to advise a defendant of his right to silence and counsel in *Miranda* was to assure that those rights were properly safeguarded before any *statements* he made should be used against him, not his silence. *See Miranda,* 382 U.S. at 467-79, 86 S.Ct. at 1624-30. [footnote omitted] To hold, as the Government contends the Supreme Court did in *Doyle,* that

[4] The Court recognizes that the Eleventh Circuit, in *Rivera,* has come to the opposite conclusion. However, that is the only circuit court to have so ruled. Moreover, the opinion contains no reasoned analysis of the issue. *See Rivera,* 944 F.2d at 1568.

> the failure to give those same warnings permits the state to use a defendant's silence against him turns a whole realm of constitutional protection on its head.

Id. at 386 (emphasis in original).

The prosecutor in the present case elicited the fact that Valentine was silent upon arrest from two police witnesses in her case-in-chief, thereby drawing an impermissible connection between Valentine's silence and his guilt. (Lodgment No. 1, Vol. 18 at 3430; Vol. 22 at 4077.) The prosecutor then increased the magnitude of this error by arguing to the jury, at two separate points, that Valentine's silence was evidence of his guilt. (Lodgment No. 1, Vol. 26 at 4686, 4787.) The state court's opinion approving of these actions reflects a fundamental misunderstanding of the Fifth Amendment's protections, as well as the distinction between silence used for impeachment and silence used as substantive evidence of guilt. Thus, the state court's decision was an unreasonable application of clearly established Supreme Court law.[5] *Williams*, 529 U.S. at 407, 412-13.

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[5] Valentine also argues that admitting evidence of his silence was a violation of California Evidence Code section 352 because it was both irrelevant and prejudicial. *See* Cal. Evid. Code § 352. State evidentiary rulings are not cognizable on federal habeas review unless the admission of evidence violated the petitioner's right to a fair trial. *Estelle v. McGuire*, 502 U.S. 62, 70 (1991). In light of this Court's decision that the use of Valentine's silence as substantive evidence of guilt violated Valentine's Fifth Amendment rights, the Court finds that the such use also violated his right to a fair trial under *Estelle*.

2. Adoptive admission instruction – Valentine's silence upon arrest

Valentine maintains that the Fifth Amendment error was compounded by the trial court's decision to give an "adoptive admissions" instruction to the jury pertaining to his silence in the face of Donaldson's statement, "You are under arrest for murder." The trial court gave CALJIC No. 2.71.5, in which the court told the jury that they could consider Valentine's failure to deny the officer's accusation of murder at the time of his arrest as *substantive evidence of his guilt*:

> If you should find from the evidence that there was an occasion when the defendant (1) under conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial or made false, evasive or contradictory statements, in the face of an accusation, expressed directly to him or in his presence, charging him with its commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.

CALJIC 2.71.5.

The state appellate court found that this adoptive admission instruction was proper, basing this conclusion

on its prior erroneous finding that Valentine's post-arrest, pre-*Miranda* silence was admissible under *Fletcher*:

> In Part II, *ante,* we found evidence of Valentine's silence following Donaldson's arrest announcement was admissible because it supported a reasonable inference that under the circumstances surrounding the accusatory statement Valentine had a fair opportunity to deny the accusation. CALJIC No. 2.71.5 told the jury what to do with this evidence. We also noted that it was up to the jury to determine if the silence did not constitute an adoptive admission. In this regard, we observe CALJIC 2.71.5 states in pertinent part: "Unless you find that the defendant's silence at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."
>
> The instruction was properly given with respect to the arrest announcement.

(Pet., Ex. A at 53-54.)

In *Henderson v. Kibbe,* 431 U.S. 145 (1977), the United States Supreme Court stated the standard of review for instructional error in habeas cases:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", *Cupp v. Naughten,* 414 U.S. [141], at 147, 94 S.Ct., at 400, 38 L.Ed.2d 368, not merely

> whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146, 94 S.Ct., at 400. [T]he . . . burden is especially heavy [when] no erroneous instruction was given. . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.

Id. at 154; *see also Gilmore v. Taylor,* 508 U.S. 333, 343-44 (1993) (finding that the right to present a complete defense does not entitle a defendant to a particular set of jury instructions). The state court reasoned that the adoptive admission instruction was properly given because the evidence of Valentine's post-arrest, pre-*Miranda* silence had been properly admitted. According to the state court's opinion, the instruction merely told the jury what to do with properly admitted evidence. (*See* Pet., Ex. A at 53-54). However, as set forth above, the admission of Valentine's silence as substantive evidence of guilt violated his Fifth Amendment rights. The adoptive admission jury instruction significantly increased the magnitude of the Fifth Amendment violation by highlighting Valentine's silence, and then telling the jury that it could consider Valentine's silence as substantive evidence of his guilt. For these reasons, the Court concludes that the adoptive admission jury instruction infected the trial to such an extent that the resulting conviction violates due process, and thus constitutional error occurred. *See Henderson,* 431 U.S. at 154.

3. Harmless error analysis

A finding of constitutional error alone does not entitle Petitioner to habeas corpus relief. Under *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993), constitutional errors

warrant a grant of the habeas petition only if they had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623. However, significantly, "[this] inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *O'Neal v. McAninch,* 513 U.S. 432, 438 (1995) (quoting *Kotteakas v. United States,* 328 U.S. 750, 776 (1964)). Rather, "the question is . . . what effect the error had or reasonably may be taken to have had upon the jury's decision." *Padilla v. Terhune,* 309 F.3d 614, 621-22 (9th Cir. 2002) (quoting *Kotteakas,* 328 U.S. at 776). If a review of the record "leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict. . . " the error is not harmless. *O'Neal,* 513 U.S. at 435.

The Ninth Circuit addressed a similar situation in *Franklin v. Duncan,* 884 F. Supp. 1435, *aff'd* 70 F.3d 75 (9th Cir. 1995). In *Franklin,* a pre-AEDPA case, the defendant was accused of raping and murdering an eight-year-old girl twenty years before the trial took place. The prosecution's case was based on the defendant's daughter's "recovered memory" of the crime. The Court found the prosecutor committed *Doyle* error by commenting on the defendant's post-*Miranda* silence at trial, and that this error was compounded by the giving of the same adoptive admission instruction as was given in Valentine's case. *See Franklin v. Duncan,* 70 F.3d at 77-78; *Franklin,* 884 F. Supp. at 1448. In finding that the *Doyle* error was not harmless under *Brecht,* the Court said, "[we are] aware of no case where the trial court explicitly instructed the jury that they could consider petitioner's silence as evidence of his guilt in which the constitutional violation was found to be harmless error." *Franklin,* 884 F. Supp. at 1449.

There are some important differences between *Franklin* and the present case. In *Franklin,* the prosecution's case was based entirely on the defendant's daughter's testimony. There was no physical evidence linking the defendant to the crime. *Franklin,* 884 F. Supp. at 1439-43. Thus, the jury was confronted with a credibility contest between the defendant's daughter and the defendant, and the inference of guilt the jury was permitted to draw from the defendant's silence bolstered the prosecution's case significantly. In contrast, the prosecution in Valentine's case presented physical evidence linking Valentine to the crime. Blood, which DNA testing confirmed was consistent with Kenneth Valentine, was discovered in the Dodge truck, on Valentine's clothes, and in his bathroom. In addition, the prosecutor presented evidence that Valentine gave a full confession. Thus, in contrast to *Franklin,* the jury had other incriminating evidence which, if believed, could form the basis for its decision.

However, the similarities between the present case and *Franklin* are more significant. In *Franklin,* the prosecutor elicited testimony about the defendant's silence from one witness, his daughter. In Valentine's case, the prosecutor elicited on direct examination of two police officers the fact that Valentine remained silent when informed that he was under arrest for murder. (*See* Lodgment No. 1, Vol. 18 at 3430; Vol. 22 at 4077). In each case, the prosecutors also emphasized the defendant's silence to the jury in their closing arguments. In *Franklin,* the prosecutor referred to the defendant's silence four times, emphasizing that the silence constituted evidence of guilt:

> Assume for the moment that Mr. Franklin is not guilty. He has not committed this murder; he knows it. He didn't do this. And he learns that

his daughter, who is accusing him of this murder, who has caused him to be arrested, is there to see him at the jail. What is he going to say to her? *What would any innocent person in a similar situation do?* Eileen, why are you doing this? You know its not true. Whatever it is, we'll talk about it. Don't do this to me. You know it's wrong. You're lying. Are you sick? Are you angry? What is going on? Why are you falsely accusing me? *Does he say any of those things? No.*

. . . .

Ladies and gentlemen, Mr. Franklin's response was to point to a sign that says: "Notice. This station may be monitored."

. . . .

He believes the conversation is being monitored, *and he does not deny a false accusation of murder? Well, why bother?* Why bother to deny it when the only two people there are the people that know? . . . But if he were innocent, ladies and gentlemen, wouldn't he be telling her that loudly and clearly?

. . . .

Ladies and gentlemen, that exchange alone is worth its weight in gold when you put it into the equation of proof beyond a reasonable doubt. The court has instructed you that the law recognizes what is called an adoptive admission. . . . *and when the defendant heard that accusation and understood it, the circumstances of his silence on that occasion may be considered against him as indicating an admission that the accusation thus made was true.*

Franklin, 70 F.3d at 76-77 (emphasis added).

The prosecutor in Valentine's case also argued, at two separate times during her closing argument, that Valentine's post-arrest, pre-*Miranda* silence proved his guilt:

> When the defendant was placed under arrest for the murders of his parents, why no questions, no protest? Because he already knew. He knew why they were there. *Can you imagine? You're under arrest for murder. No comment whatsoever? No protest?*
>
> . . . .
>
> It just happens that when he's placed under arrest for murder he says nothing, nothing. "You are under arrest for murder." Silence . . . He's not asking "Why am I placed under arrest for murder?" because he knows. He knows why they're there. He just doesn't know how they found out and what they know and he's going to be careful. *That evidence is consistent with a guilty person. Can you imagine, if I told you were placed under arrest for murder, and you don't ask any questions?*

(Lodgment No. 1, Vol. 26 at 4686, 4787) (emphasis added).

In both cases, the prosecutor's references were "'calculated so that an inappropriate "inference of guilt from silence was stressed to the jury. . . ."'" *Franklin,* 884 F. Supp. at 1448 (quoting *United States v. Kallin,* 50 F.3d 689, 693 (9th Cir. 1995) and *United States v. Foster,* 985 F.2d 466, 468 (9th Cir. 1993)). However, the use of Valentine's silence by the prosecution was even more egregious than in *Franklin.* In *Franklin,* the silence was in response to the defendant's daughter's accusation, made during a personal visit. Here, Valentine's silence occurred while he

was in custody, and in response to a direct accusation by a police officer.

Further, like *Franklin,* this case turned on credibility, and the improperly admitted evidence both damaged the defense's credibility and bolstered the prosecution's. The two main pieces of evidence against Valentine were his confession and the DNA evidence which linked him to the murders. Valentine testified that he had not confessed, but that Donaldson repeatedly attempted to convince him to do so. Moreover, Valentine testified that the alleged confession was manufactured by Donaldson and Verduzco from information they had gleaned from interviews with Valentine and from evidence obtained during the investigation.[6] (Lodgment No. 1, Vol. 23 at 4284-88, 4399-4400.) Donaldson testified on cross-examination he had locked his tape recorder in his trunk while transporting Valentine from the police department to the jail, despite the fact that it was police department policy to tape record statements whenever possible, and despite the fact that he had tape recorded other witnesses statements in the past. (Lodgment No. 1, Vol. 18 at 3454-55). Donaldson also testified on cross-examination that he had taken down Valentine's statement verbatim beginning at the bottom of the page, then had filled in other notes at the top of the page at a later time. However, there was no space between the statement and the material allegedly inserted later, and

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[6] The state trial court prevented Valentine from cross-examining Donaldson regarding the intended purpose of his post-arrest visit to Valentine in jail. (Lodgment No. 1, Vol. 18 at 3485-86.) The disallowed cross-examination would have further cast Donaldson's and Verduzco's veracity into question, which in turn would have further called into question their version of the confession. *See infra* Section E(1)(a).

there appeared to be no difference between the handwriting used to take the statement and the handwriting used in the inserted material, despite the fact that Donaldson testified he had been writing hurriedly as Valentine spoke. (Lodgment No. 18 at 3448, 3475-80.) Verduzco testified on cross-examination that Valentine's confession was "startling" and "shocking," yet he admitted that he did not even mention the confession in his report. (Lodgment No. 1, Vol. 19 at 3595-96.) Verduzco further admitted he also had a tape recorder, but that he, like Donaldson, had placed it in the trunk before transporting Valentine to jail. (*Id.* at 3598-99.) Given the defense challenge to the credibility of Donaldson and Verduzco, the jury may have considered Valentine's version of the events to be more credible had Valentine's silence not been improperly admitted.

The improperly admitted evidence also damaged Valentine's defense to the DNA evidence. Blood stains were found in the Valentines' Dodge truck, clothes found in the Valentine residence, in the bathtub and a on bath mat in the bathroom. The San Diego Police Department identified Kenneth as the likely source of blood on stains found on the Dodge truck's keys, gearshift, and steering wheel, a pair of jeans, two shirts, the bathtub and the bath mat. (Lodgment No. 1, Vol. 17 at 3075-3160.) Cellmark's DNA testing identified stains on the Dodge keys, the Dodge truck's steering wheel and a shirt as consistent with Kenneth Valentine's DNA with a rarity of match of one in 630,000, and a stain on the Dodge truck's gearshift as consistent with Kenneth Valentine with a rarity of match of one in 310,000,000. (Lodgment No. 1, Vol. 17 at 2604-08, 2620-21, 2622, 2640, 2647-54, 2553-54.) The prosecution relied heavily on this evidence, arguing that "the blood evidence alone in this case is proof beyond a reasonable

doubt that the defendant murdered his parents." (Lodgment No. 1, Vol. 26 at 4676-78.)

However, counsel pointed out several inconsistencies in the testing. For example, counsel questioned whether the proper testing procedures had been followed to ensure no contamination had occurred. (*See* Lodgment No. 1, Vol. 17 at 2664, 3203-05, 3216-17, 3223, 3230, 3232, 3238-41, 3243-44.) Counsel also questioned the reliability of two kinds of DNA testing, RFLP and STR tests, due to the presence of "faint bands" on the testing film, which could indicate either technical artifacts of the testing process or the presence of a second individual's DNA, and possible contamination of the tests. (*Id.* at 3231-37, 3243-44; 3252-54.) Significantly, however, Valentine's counsel was not afforded the opportunity to cross-examine the individual who produced Cellmark's tests because the results were erroneously admitted in evidence as "business records." *See* Section B, infra. Further, Valentine testified that his father, while wearing an old pair of Valentine's jeans, had cut his finger while moving a table in Diane Valentine's office several days before the murders, then had driven the Dodge truck home. Valentine also testified that Kenneth Valentine sometime used his bathroom, and that he sometimes shaved in the shower. (Lodgment No. 1, Vol. 23 at 4242.) Again, absent the improperly admitted evidence of Valentine's silence, the jury may have found Valentine's explanation more credible.

While substantial evidence was introduced against Valentine, the reliability of that evidence was challenged, and a credible alternative explanation for much of the prosecution's case was presented. In such a situation, the Fifth Amendment errors could very well have had a "substantial influence" on the jury's verdict by damaging

the credibility of Valentine's alternative explanations. *See O'Neal*, 513 U.S. at 438. Moreover, if the prosecution had not been permitted to use Valentine's silence as substantive evidence of guilt in its case-in-chief (and had the other errors discussed in the Report not occurred), Valentine may have chosen *not* to take the stand in his own defense at trial.[7] Despite this, the Court cannot say with sufficient certainty that the Fifth Amendment errors, *by themselves*, had a substantial and injurious effect on the jury's determination. *See Brecht*, 507 U.S. at 637. However, the cumulative effect of the Fifth Amendment violations and other errors in this case will be considered by the Court in Section I of this Report and Recommendation.

4. Adoptive Admission Instruction –Valentine's Silence During a Jail Visit by Mary Ellis

Valentine also alleges that the adoptive admission instruction was improperly given with respect to his silence during a jail visit by Mary Ellis, a friend of Kenneth and Diane Valentine. Specifically, Valentine argues that the adoptive admission instruction was not warranted because Ellis did not ask an accusatory question or make an accusatory statement during her visit. Valentine also claims that even if Ellis had asked an accusatory question or made an accusatory statement to him, the adoptive

[7] For this reason, an argument that the prosecution could have used Valentine's post-arrest, pre-*Miranda* silence in any event to impeach him, since he did testify at trial, is unavailing. Further, as noted above, even if Valentine's silence could have properly been used to impeach his trial testimony, this is far different – and far less prejudicial – than allowing the prosecutor to use it as substantive evidence of guilt.

admission instruction violated his Fifth Amendment rights. (*See* Pet. at 64-65.)

In its opinion, the state appellate court found that the adoptive admission instruction was proper because the adoptive admission instruction was self-limiting:

> With respect to the friends' visit at the jail, Valentine raises a foundational argument – namely, that none of his friends made an accusation or asked an accusatory question. Valentine argues therefore that his lack of denial of guilt was not an adoptive admission and therefore did not justify the giving of CALJIC No. 2.71.5. However, as we have pointed out, CALJIC No. 2.71.5 was warranted on the basis of Valentine's silence after the arrest announcement. In any event, we note CALJIC 2.71.5 contains the foundational requirements for the use of admissions – whether the accusatory statements were made, whether they were directed to the defendant, whether he or she heard and understood the statements, whether they were made under conditions fairly offering him or her an opportunity to reply, and whether he or she failed to make a denial of them. (*People v. Vindiola*, *supra*, 96 Cal.App.3d at p. 382.) The instruction also provided guidance to the jury how to evaluate this evidence, including permission to entirely disregard it.

(Pet., Ex. A at 54.)

As noted above, under *Henderson* Valentine must establish that the "'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Henderson*, 431 U.S. at 154 (quoting *Cupp v. Naughten*, 414 U.S. at 147.) This Court has

already determined that the state appellate court's first rationale, that the instruction was warranted on the basis of Valentine's silence, was erroneous and that, in conjunction with the admission of Valentine's post-arrest, pre-*Miranda* silence, the instruction violated Valentine's Fifth Amendment rights. *See* Section A(1) & (2) *ante*. This leaves only the state court's second rationale, that the instruction itself was self-limiting.

Valentine cites *Franklin* in support of this claim as well. In *Franklin*, the district court found that the use of the defendant's post-*Miranda* silence in the face of his daughter's accusations, when coupled with the adoptive admission instruction, violated the defendant's Fifth Amendment rights, despite the fact that the defendant's silence had been invoked in response to a private party's accusation, not an official police accusation. This was true in large part because the evidence supported a finding that the defendant was invoking his Fifth Amendment right to remain silent when speaking to his daughter. *Franklin*, 884 F. Supp. at 1447. The *Franklin* Court noted that while "*Doyle* and the majority of cases interpreting it concern a defendant's post arrest failure to explain his conduct to the police," silence in the face of accusations from private parties may also fall under *Doyle's* rationale:

> Even if petitioner had not pointed at the sign [thereby invoking his Fifth Amendment rights] the Court believes that the circumstances are such that it would have been improper for the government to use petitioner's silence against him at trial. *Doyle* explains that the state may not use a defendant's post-*Miranda* silence against him at trial because silence in the wake of *Miranda* warnings is "insolubly ambiguous" and "may be nothing more than the arrestee's

> exercise of these *Miranda* rights. *Doyle*, 426 U.S. at 617, 96 S.Ct. at 2244. *Doyle* does not place a burden on the defendant to prove that he was exercising his *Miranda* rights in remaining silent. Because post-*Miranda* silence is "insolubly ambiguous," such silence may not be used against the defendant at trial.

Franklin, 884 F. Supp. at 1447.

In the present case, there is no evidence to support a finding that Valentine was asserting his Fifth Amendment rights at the time of the jail visits. Valentine testified he did not deny he killed his parents to Mary Ellis and Linda Litle because he "assumed they were there because they believed me and they knew me and that I wasn't capable of doing something like that – like was I was accused of." (Lodgment No. 1, Vol. 24 at 4402.) Ellis testified that when she asked if he knew why he was in custody, Valentine replied that he did not remember what happened the night his parents were murdered. (Lodgment No. 1, Vol. 25 at 4546-47.) Linda Litle also testified that Valentine told her he did not remember anything. (Lodgment No. 1, Vol. 21 at 3949.) Moreover, Valentine's defense counsel objected to the court giving the adoptive admission instruction with respect to Valentine's failure to deny his culpability during the jail visit on grounds other than Valentine's invocation of his Fifth Amendment rights:

> The second potential basis is some suggestion that when he was being spoken to in jail by friends, that he was required, on pain of the admission of testimony, to say in the context of a social visit, "I did not kill my parents." And, to me, that – he was never given an accusation. He was never accused by Mary Ellis or Linda Litle or any of the others. He was never - and both

> witnesses testified to that, both Linda Litle and Miss Ellis testified, "We didn't interrogate him. We didn't make accusations. We were there to support him."
>
> There was no accusation hurled at him, and therefore no obligation under this instruction or under the law to make a response. I would therefore respectfully submit that there is no factual basis for it.

(Lodgment No. 1, Vol. 25 at 4601.)

Despite these facts, however, the *Franklin* Court's rationale applies here as well. Because any post-*Miranda* silence by Valentine during the jail visits by his friends was "insolubly ambiguous," its use by the prosecution as evidence of guilt violated Valentine's Fifth Amendment rights. Thus, the state court erred by giving the adoptive admission instruction with respect to Valentine's silence during his friend's visits.

There was a second basis for giving the instruction, however. CALJIC 2.71.5 also permits the jury to consider any "false, evasive or contradictory statements" as evidence of that any accusation made against him was true. (CALJIC 2.71.5.) Here, Ellis and Litle testified that Valentine told them he "didn't remember" what happened the night his parents were murdered. (Lodgment No. 1, Vol. 21 at 3949, Vol. 25 at 4546-47.) At trial, however, Valentine testified quite clearly as to his movements and actions the night of the murders. (Lodgment No. 1, Vol. 23 4219-4300, Vol. 24 at 4313-4420.) There was a significant contradiction between Valentine's statements to Ellis and Litle and his trial testimony which formed a legitimate basis for the adoptive admission instruction. Therefore, Valentine has not established that the trial court's giving

the adoptive admission instruction with regard to the jail visits "so infected the entire trial that the resulting conviction violates due process." *Henderson*, 431 U.S. at 154 (citing *Cupp*, 414 U.S. at 147.)

B. Sixth Amendment Violation – Admission of DNA Tests as Business Records

In his next claim, Valentine alleges that the admission of Cellmark's DNA test results violated his Sixth Amendment right to confront witnesses. Dr. Charlotte Word testified regarding the Cellmark DNA testing performed on evidence collected from the crime scene, and the blood samples taken from both the victims and from Valentine. Dr. Word, however, did not perform those tests. Rather, another employee of Cellmark, Melissa Weber, performed the Cellmark DNA testing. Dr. Word merely reviewed Weber's work, then testified as to the results. Over Valentine's objection, the state trial court ruled that the Cellmark DNA test results were admissible as business records under state law.[8] Valentine argues that this ruling

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[8] California Evidence Code section 1271 reads:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissable by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The source of information and method and time of preparation were such as to indicate its trustworthiness.

Cal. Evid. Code § 1271 (West 1999).

violated his Sixth Amendment confrontation rights because he was prevented from cross-examining Weber, the scientist who actually performed the Cellmark DNA testing. (*See* Pet'rs P. & A. at 52-5.)

1. Whether Charlotte Word's testimony was hearsay

The first question this Court must address is whether Dr. Word's testimony was hearsay. "Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974); *see also* Cal. Evidence Code § 1200(a) (West 1999). If such statements are not hearsay, they are admissible simply if relevant in some way to prove the crime charged. *Anderson*, 417 U.S. at 221; *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (finding that the admission of a non-hearsay statement "raises no Confrontation Clause concerns"); *Estelle*, 502 U.S. at 70 (finding that testimony does not violate due process if it is relevant). Here, the Cellmark DNA test results were unquestionably hearsay, as they were out of court statements submitted for the truth of the matter asserted. They were also clearly relevant because they provided a physical link between Valentine and his parents' murders.

2. Admission of the DNA test results as business records

Since the Cellmark DNA test results were hearsay, the Court must determine whether admitting them violated Valentine's Sixth Amendment rights. The state trial court ruled that the test results constituted an exception

to the hearsay rule and thus were admissible as business records under state law. On appeal, the state appellate court agreed:

> Weber's report met the requirements of Evidence Code section 1271. It recorded an act – DNA testing – and was offered as proof of the act. The report was "made in the regular course of [Cellmark's] business," which is forensic testing, "at or near the time of the act." (Evid. Code, § 1271.) Word, a "qualified witness testifie[d] to [the] identity and the mode of its preparation." (*Ibid.*) Word's testimony discussed Cellmark's laboratory protocols and the fact that Weber's work was reviewed by a scientist with a doctorate degree who examined
>
> > "all the data and information recorded in the case folder . . . to see that all the appropriate controls were followed, that the appropriate standard operating procedures were followed, that the appropriate documentation is recorded, and then review the actual data, independently interpret it, and then check the report to see that the results have been correctly recorded and interpreted."
>
> This testimony provided substantial evidence "to indicate [the report's] trustworthiness." (Evid. Code, § 1271.)
>
> As the Court of Appeal observed in *County of Sonoma v. Grant W.*, *supra*, 187 Cal.App.3d at page 1451:

> "'"In the case of the conduct of the business and affairs of an establishment, it is presumed that the regular course of business of such establishment is followed . . . and that the books and records of an establishment truly reflect the facts set forth in such books. . . .'" [Citations.]"

In other words, the trustworthiness element of the business records exception is directed at whether a trustworthy written document has been created. Here, this inquiry would be whether it can be presumed Weber's report accurately reflected her testing results based on her following Cellmark's protocols, including timely and accurate documentation of test results. The inquiry is separate and distinct from the third *Kelly* prong of whether the correct scientific procedures were used.

Valentine contends the report was inadmissible under the business records exception because it was prepared for litigation purposes. We disagree. The report evidences the DNA tests conducted on crime scene samples and blood samples of the Valentine family members; these are the kinds of tests routinely performed by Cellmark. (See *County of Sonoma v. Grant W., supra*, 187 Cal.App.3d at p. 1452) The report is not the type of self-serving record that was outside the normal scope of business activities and prepared specifically for litigation. (*Ibid.*)

Valentine argues unpersuasively his Sixth Amendment right to confront witnesses against him was violated by admitting Weber's report without her making her available for cross-examination. In *People v. Beeler*, (1995) 9 Cal.4th

> 953, 979, the Supreme Court rejected this argument, noting a document that has been admitted under the business records exception has adequate "'indicia of reliability to satisfy the requirements of the confrontation clause.'" (Relying on *People v. Clark* (1992) 3 Cal.4th 41, 159 [Evid. Code, § 1280].)

(Pet., Ex. A at 45-47.)

In addressing Valentine's Sixth Amendment claim, this Court must examine two intertwined questions: (1) whether the state court's ruling that Cellmark's DNA tests were business records was correct, and (2) whether the resulting inability to cross-examine Weber, who actually performed the tests, violated Valentine's Sixth Amendment rights. Clearly established Supreme Court law states that "a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999) (citing *Henry v. Kernan*, 177 F.3d 1152, 1159 (9th Cir. 1999)); *see also Estelle v. McGuire*, 502 U.S. 62, 70 (1991). However, in the context of this case, this determination must be made in light of the effect the evidentiary ruling had on Valentine's Sixth Amendment rights.

In order to satisfy the Sixth Amendment's Confrontation Clause, the prosecution must normally show: (1) the hearsay statement is reliable, and (2) the hearsay declarant is unavailable. *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000) (citing *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Although the Supreme Court has

not explicitly decided whether the business records exception is firmly rooted, the *Roberts* Court noted that the business records exception is one which "rest[s] upon such solid foundations that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'" *Id.* at 66, n. 8; *see also United States v. Ray*, 930 F.2d 1368, 1371 (9th Cir. 1991) (finding that the business records exception is firmly rooted, citing *Roberts*); *Duhaime*, 200 F.3d at 600.

The business records exception to the hearsay rule is grounded upon the notion that such records are inherently reliable. *See* John William Strong, *McCormick on Evidence*, § 285-87 (4th ed. 1992). This is true for two main reasons. First, the creators of such records are generally required to adhere to certain procedures when creating the records. *Id.* at § 288; Witkin, *California Evidence* § 226. (4th ed. 2000). Second, they are generated in the "normal course of business," not for the purpose of litigation or for other self-serving reasons. Strong, at § 288; *see also Palmer v. Hoffman*, 318 U.S. 109, 111-14 (1943). Business records have historically included such things as "shop books," account books, time cards, files, and other recordations of daily business transactions. Strong at § 287; Witkin at § 228-29; *Palmer*, 318 U.S. at 115.

The DNA evidence at issue here consisted of tests performed by a Cellmark employee, Melissa Weber, and testified to by Dr. Charlotte Word, who supervised Weber's work but who did not perform any actual DNA tests. Dr. Word testified Cellmark did RFLP testing on a stain from the Dodge truck's gearshift (stain 21-A), a stain from the Dodge truck's steering wheel (stain 22-B), and a stain from a shirt found in the Valentine residence (stain 7-A). (Lodgment No. 1, Vol, 17 at 3075, 3081-82, 3087.) Her

conclusion based upon the RFLP testing alone was that Kenneth Valentine could not be excluded as the source of these stains, but that Diane and Alexander Valentine could be excluded. (Lodgment No. 1, Vol. 14 at 2604-08, 2620-21.) For the gearshift, the calculation for the rarity of the match was one in 310,000,000 Caucasians. (*Id.* at 2622.) Based on the test results, no similar calculations could be made the steering wheel stain or the shirt stain. (*Id.* at 2624-25.)

Cellmark also performed another type of DNA test, Short Tandem Repeat ("STR") testing, on the shirt stain (7-A) and the steering wheel stain (22-B). Dr. Word testified the STR results on the shirt stain indicated it was a mixed sample from which Alexander Valentine could be excluded, but Kenneth and Diane Valentine could not. (*Id.* at 2640.) The estimate for rarity of the match was one in 420 Caucasians; when combined with the DQ-Alpha Polymarker ("DQA1") testing done by the San Diego Police Department, the rarity of the match was one in 630,000 Caucasians. (*Id.* at 2647.) Dr. Word also determined that the steering wheel stain (22-B) was consistent with Kenneth Valentine, with the possibility it was a mixed sample, and with a rarity of match of 420 Caucasians. When combined with the DQA1 testing done by the San Diego Police Department, the rarity of match was one in 630,000 Caucasians. (*Id.* at 2553-54.) Dr. Word further testified regarding STR testing done on two other stains: (1) a stain from the Dodge truck keys (stain 2-A), which Dr. Word concluded excluded Alexander and Diane Valentine, but did not exclude Kenneth Valentine, with a rarity of the match calculated at one in 420 Caucasians, and one in 630,000 when combined with the San Diego Police Department's DQA1 testing; and (2) a second stain from the

Dodge truck's steering wheel (22-A), which Dr. Word concluded was a mixed sample from which neither Kenneth nor Diane Valentine could be excluded, with a rarity match of one in 420 Caucasians, and one in 630,000 when combined with the San Diego Police Department's DQA1 testing. (*Id.* at 2652.)

Contrary to the state court's decision, Cellmark's DNA tests are nothing like the kind of records contemplated by the business records exception because they are not inherently reliable. In *Palmer*, the Supreme Court described business records as "entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." *Palmer*, 318 U.S. at 113. The trustworthiness of business records lies in the fact that they are "routine reflections of the day to day operations of a business . . . " and are "record[s] made for the systematic conduct of the business as a business." *Id.* at 113-14. DNA tests do not record an event, occurrence or a routine operation of a business. While it may be the business of Cellmark to produce DNA tests, DNA tests are not "made for the systematic conduct of the business as a business." *Id.* at 113. DNA tests are highly sensitive, highly complex tests which require sophisticated scientific interpretations. The DNA tests are not business records simply because they were prepared by Cellmark, who's business it is to perform DNA tests:

> If experts were permitted to prepare documentation of their findings and submit the documentation as a business record because, as experts, they prepared the documentation pursuant to their normal course of business, then they would be permitted to introduce a great degree of bias

> into the proceedings and would never be subject to cross-examination.

Lane, 108 Ohio App. 3d at 279-80.

Further, Cellmark's DNA tests, unlike business records, were not prepared in the ordinary course of business, but rather in anticipation of litigation. All of Cellmark's testing was performed at the request of the prosecution. When a document is prepared in anticipation of litigation, "the underlying rationale of trustworthiness is supplanted by a natural motivation to color the facts in favor of the requesting entity." *State v. Lane*, 108 Ohio App. 3d 477, 488 (1995) (citing *Palmer*, 318 U.S. at 113.) As the *Palmer* Court noted:

> Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. [citation omitted]. Regularity of the preparation would become the test rather than the character of the records and their earmarks of reliability [citation omitted] acquired from their source and origin and the nature of their compilation.

Palmer, 318 U.S. at 113-114.

The concern expressed by the court in *Palmer* played out here. The accuracy of DNA tests depends on the technician's scrupulous adherence to testing procedures. If these procedures are not followed properly, specimens can be contaminated and results can become unreliable. (*See* Lodgment No. 1, Vol. 17 at 3203-05, 3232, 3238-41, 3243-44.) Despite this, Valentine was prevented from cross-examining

the person who actually conducted these sensitive and complex tests. Dr. Word did not perform any of the Cellmark DNA testing. She could only testify that proper procedures *should have* been followed, and that the notations in the records were consistent with her *conclusion* that these procedures were followed. She could not testify from her own personal knowledge as to whether these procedures were *actually* followed. (Lodgment No. 1, Vol. 14 at 2664; Vol. 17 at 3216-17; 3223, 3230.)

Moreover, there was a significant dispute about the reliability of the RFLP and STR tests due to the presence of "faint bands" on the testing film. Through Dr. Word's testimony, the prosecution attempted to establish that these "faint bands" were technical artifacts of the testing process. Dr. Word conceded, however, that the bands could also indicate the presence of another individual's DNA, and possible contamination of the tests. (*Id.* at 3231-37, 3243-44; 3252-54.) Because the trial court's ruling that Cellmark's DNA tests were business records eliminated the need for the prosecution to call the scientist who performed the test, however, Valentine could not fully explore this discrepancy.

"'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999) (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)). The DNA tests were certainly one of the most compelling pieces of evidence introduced against Valentine. Indeed, the prosecutor relied heavily on the DNA tests, arguing that "the blood evidence in this case is overwhelming," "the blood evidence alone in this case is proof beyond a

reasonable doubt that the defendant murdered his parents," and "[t]he DNA is a witness to the crime, a silent witness to the crime, a very strong witness to this crime." (Lodgment No. 1, Vol. 26 at 4676-78.) Yet Valentine was prevented from fully challenging this evidence.

For the foregoing reasons, the Court concludes that the state court's evidentiary ruling admitting Cellmark's DNA tests as business records was an unreasonable application of *Palmer* because it insulated these highly sensitive, and highly incriminating, scientific tests from proper cross-examination about the accuracy and reliability of the testing procedures, thereby violating Valentine's Sixth Amendment right to confrontation. *See Bell v. Cone*, 122 S.Ct. 1843, 1851-52 (2002); *Williams*, 529 U.S. at 411. Moreover, because Cellmark's DNA tests were central and compelling pieces of evidence against Valentine, the error rendered Valentine's trial "so fundamentally unfair as to violate due process." *Spivey*, 194 F.3d at 977-78.

3. Harmless error

Confrontation clause errors are subject to harmless error analysis under *Brecht*. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681-84 (1986); *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002). As previously noted, the question under *Brecht* is whether the erroneously admitted evidence had a substantial and injurious effect on the jury. *Brecht*, 507 U.S. at 637. Cellmark's DNA tests were a substantial part of the criminal case against Valentine. The tests indicated the likelihood that Kenneth Valentine's blood was present on the Dodge truck key, the truck's steering wheel and gearshift, and a shirt found in what was alleged to be Alexander Valentine's bathroom at the

Valentine residence. The rarity of the match with Kenneth's DNA was calculated by Cellmark to be one in 630,000 for the key stain, the steering wheel stain and the shirt stain, and one in 310,000,000 for the gearshift stain. Lodgment No. 1, Vol. 17 at 2604-08, 2620-21, 2622, 2640, 2647, 2647-54, 2553-54.) This evidence was consistent with the prosecution's theory that Valentine murdered his parents, drove the Dodge truck home, discarded blood stained clothes, then washed up in his bathroom at the Valentine residence.

However, Cellmark's DNA tests were not the only DNA testing introduced by the prosecution against Valentine. The San Diego Police Department also conducted DNA testing on several pieces of evidence, including the four pieces of evidence tested by Cellmark. Annette Peer, who conducted the DNA tests for the Police Department, testified she performed DQA 1 testing on, among other things, two shirts (items 5 and 7), a pair of jeans (item 5, jeans B), the Dodge truck keys (item 2), the truck's gearshift (item 21) and steering wheel (item 22), swabs from the tub and tile of a bathroom inside the Valentine residence (item 8), and stains from a black rug and bath mat from that same bathroom. (Lodgment No. 1, Vol. 17 at 3075-3180.)

Peer's results for stain A on one shirt (item 5) showed that Kenneth could be the source of the blood, and Diane and Alexander could be excluded. (*Id.* at 3125-36.) Stain B from the shirt was a mixture, from which Kenneth, Diane and Alexander could not be excluded. (*Id.* at 3128.) Stain Q from the shirt was also a mixture. Kenneth could be the primary source, while Diane and Alexander were excluded. (*Id.* at 3129-30.) On the jeans (item 5, jeans B), Peer's results indicated that Kenneth could be the source of stain

A, but Diane and Alexander were excluded. (*Id.* at 3137.) With stain C, Peer testified that Alexander could be the source of the stain, but Diane and Kenneth could not. (*Id.* at 3138.) The rarity of the match with Kenneth Valentine as the primary source of shirt stain A of item 5, stain A on the jeans, and the tile was one in 1300. (*Id.* at 3153-56.) Because the stains revealed a mixed sample, no frequency could be generated for stains B and Q on the first shirt (item 5) (*Id.* at 3149-53.)

Peer further testified that a stain on the second shirt, which Cellmark also tested (item 7), revealed a mixture of DNA. Kenneth could be the primary source of the stain, and Diane and Alexander could not be excluded as the secondary source. (*Id.* at 3098-99, 3102.) No frequency could be generated for rarity of match for the second shirt stain, however, because of the nature of the mixed sample. (*Id.* at 3159.) Peer's test results from stain A of the gear-shift handle (item 21) yielded a mixture of DNA. Kenneth could be the primary source of the stain, and Diane and Alexander could not excluded as contributing to the secondary source. (*Id.* at 3085-86.) On stain A from the steering wheel (item 22), Peer testified that her results indicated a mixture of DNA. Kenneth could be the primary source of the stain, while Diane and Alexander could be excluded. (*Id.* at 3091-92.) Neither Diane nor Alexander could be excluded as the source of the secondary type. (*Id.* at 3092.) Stain B from the steering wheel yielded the same results as stain A. (*Id.* at 3093.) On the Dodge keys, Peer testified she could not exclude Kenneth as the source of the DNA, but that Diane and Alexander were excluded. (*Id.* at 3075-80.) The rarity of the match with Kenneth's' DNA on the key stain, the steering wheel stains and the

gearshift stains was one in 1300 Caucasians. (*Id.* at 3093-96.)

Finally, Peer indicated testing of a red stain on the tub or shower tile (item 9-A) revealed that Kenneth could have been the source of the stain, but Diane and Alexander were excluded. (*Id.* at 3145-46.) Peer also testified that Kenneth could have been the source of stain D on the bath mat found in the Valentine residence, but Diane and Alexander could not. The rarity of the match with Kenneth's DNA was one in 1300 for the bath mat stain and the tile stain. (*Id.* at 3172, 3155.) Thus, even without Cellmark's DNA test, there was significant DNA evidence which linked Valentine to the crime.

The existence of other evidence sufficient to support the verdict, however, does not answer the question whether the wrongful admission of the Cellmark DNA tests had a substantial and injurious effect on the verdict. The question is "rather, even so, whether the error itself had substantial influence." *O'Neal*, 513 U.S. at 438. The prosecution's case hinged on two major pieces of evidence: the DNA tests which linked Valentine to the murders, and Valentine's alleged confession. Annette Peer's DNA tests found Kenneth could not be excluded as a sole or primary contributor to the Dodge key stain, the steering wheel stain, the gearshift stain, the jeans stain, the bathroom tile stain and the bath mat stain. However, Peer was able to give a rarity of a match to Kenneth's DNA of only one in 1300. Cellmark's testing gave a much higher match rarity of one in 630,000 for the key stain, the gearshift stain A, and the steering wheel stains.

Further, the admission of Cellmark's DNA tests significantly strengthened the prosecution's case. Without

Cellmark's tests, the remaining DNA evidence was not as compelling. Dr. Word was able to give a rarity of match for Kenneth's DNA of one in 630,000 for the key stain, one of the shirt stains, one of the gearshift stains and the two steering wheel stains. Peer could only give a rarity of match of one in 1300 for the key stain, the gearshift stains, and the steering wheel stains; she could give no rarity match calculations for the shirt stain. Thus, Cellmark's DNA tests enhanced the believability of the San Diego Police Department's DNA tests.

Moreover, the validity and reliability of the other main evidence against Valentine, his alleged confession, was called into doubt in several ways: (1) the timing of the confession, coming on the heels of invocation of Valentine's Fifth Amendment rights; (2) the condition of Donaldson's supposedly verbatim raw notes of the confession, which were inconsistent with his testimony that he hurriedly wrote down everything Valentine said, while leaving exactly the right amount of space on the page; and (3) Donaldson and Verduzco' s testimony that they both locked their tape recorders in the trunk prior to transporting Valentine to the jail, despite the Police Department's policy of taping defendants' statements whenever possible. The DNA evidence as a whole tended to corroborate and bolster the validity and reliability of Valentine's alleged confession. Without it, the jury may have cast a more suspicious eye to Valentine's alleged confession.

The state court violated the Sixth Amendment by admitting Cellmark's DNA tests as business records, thereby preventing Valentine from cross-examining some of the most incriminating evidence introduced against him. As with the Fifth Amendment errors already identified in this case, the Court cannot say with sufficient

certainty that the Sixth Amendment violation *by itself* had a substantial and injurious effect on the jury's verdict. *See Brecht*, 507 U.S. at 637. However, the cumulative effect of the Sixth Amendment and other errors will be considered in this section I of this Report and Recommendation.

C. Fifth Amendment Violation – Admission of Valentine's Roadside Confession

Valentine's next claim contains two grounds for relief. First, Valentine argues that his confession was involuntary because Donaldson's response ("Well, you asked for a lawyer, but you can tell me if you want.") to his question ("I want to tell you something. Can it be used against me?") misled Valentine into believing he could speak without repercussions. (Pet'rs P. & A. at 23-38.) Valentine claims that his confession was therefore induced by fraud. Second, Valentine argues his *Miranda* rights were violated because Donaldson's response, which occurred after Valentine's invocation of his right to counsel, amounted to interrogation. Thus, Donaldson was required to obtain a new waiver from Valentine before interrogating him.

1. Clearly Established Supreme Court Law - Voluntariness and Miranda

a. Voluntariness

The Fifth Amendment bars the use of an involuntary confession against a defendant. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964). However, "a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will." *Henry v. Kernan*, 197 F.3d 1021, 1026 (9th Cir. 1999) (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). A court must consider

the totality of the circumstances in determining voluntariness, including factors such as "the surrounding circumstances and the combined effect of the entire course of the officers' conduct upon the defendant." *Id.* (citing *United States v. Polanco*, 93 F.3d 555, 560 (9th Cir. 1996)); *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973). The court must determine whether the confession is the product of the defendant's free will or whether his will was overborne. *Henry*, 197 F.3d at 1026-27 (citing *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) (en banc)); *see also United States v. Guerrero*, 847 F.2d 1363, 1366 & n. 1 (9th Cir. 1988) (citing *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam)).

b. Miranda warnings

A suspect who is subject to custodial interrogation must be advised of his federal constitutional right to remain silent and his right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966). If the suspect invokes his right to counsel, "the interrogation must cease until an attorney is present." *Id.* at 474. A suspect "may not be subjected to further interrogation unless [he] (1) initiates further discussion with the police, and (2) knowingly and intelligently waives the right he previously invoked." *Shedelbower v. Estelle*, 885 F.2d 570, 573 (9th Cir. 1989) (citing *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) and *Oregon v. Bradshaw*, 462 U.S. 1039, 1042-45 (1983)). "Absent such interrogation, there [is] no infringement of the right . . . and there [is] no occasion to determine whether there ha[s] been a valid waiver." *Edwards v. Arizona*, 451 U.S. 477, 486 (1981).

"Interrogation" includes not only direct custodial questioning by law enforcement officers, but its "functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). "A functional equivalent of questioning is any statement or conduct which the police should know is 'reasonably likely to elicit an [inculpatory or exculpatory] response from the suspect.'" *Shedelbower*, 885 F.2d at 573 (citing *Innis*, 446 U.S. at 301 & n. 5). "This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." *Innis*, 446 U.S. at 299. "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by *[Miranda]*." *Miranda*, 384 U.S. at 478.

2. Voluntariness of Valentine's Confession

Valentine first claims that his confession was involuntary because Donaldson's response, "Well, you asked for a lawyer, but you can tell me if you want," defrauded Valentine into believing that any statement he might make could not be used against him.

Although the state court cited mainly to California law in its analysis of Valentine's claim, those cases are consistent with United States Supreme Court law pertaining to the voluntariness of confessions. The court of appeal stated:

> An involuntary confession is inadmissible under the due process clauses of the federal and California Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) To be admissible, a confession must be "'the product of an essentially free and unconstrained choice . . . ' to confess. [Citations.] The question is whether defendant's

> choice to confess was not 'essentially free' because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827.)
>
> An involuntary confession is one "extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." (*People v. Benson, supra*, 52 Cal.3d at p. 778, internal quotes omitted.) "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'. . . ." (*Colorado v. Connelly.* (1986) 479 U.S. 157, 167.)
>
> The voluntariness of a confession is determined by the totality of the circumstances. (*People v. Thompson* (1990) 50 Cal.3d 134, 166.) The prosecution must prove that a confession is voluntary by a preponderance of the evidence. (*People v. Markam* (1989) 49 Cal.3d 63, 71.)

(Pet., Ex. A at 15-16.)

The state court correctly identified and applied the appropriate United States Supreme Court standard. Its decision, therefore, is not "contrary to" clearly established Supreme Court law. *See Williams*, 529 U.S. at 412-13. This Court is left to determine whether the state court opinion constitutes an "unreasonable application" of that law. *Id.* The state appellate court found that Valentine's confession was not the result of any threats, promises or other improper police techniques, and thus, that it was voluntary:

> Although Donaldson's reply can be characterized as ambiguous and/or evasive, – a simple "yes" would have been a correct answer – the reply was not a threat, a promise or an application

of undue influence. Further, the detective's reply did not contain any false information. To be sure Donaldson easily could have offered a more complete response; however, he was not required to do so. (See *Moran v. Burbine* (1986) 475 U.S. 412, 422 [Constitution does not require "police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."].)

Nor can it be fairly said that Donaldson's response overcame Valentine's free will. It was Valentine who instigated the communication by asking Donaldson to pull over. Valentine, who had become highly emotional wanted to get something off his chest. The evidence before the trial court when it ruled on the suppression motion was uncontradicted that the detectives had not done anything en route to the jail to encourage Valentine to make a statement. [footnote omitted]. The only proximate cause for the statement was Valentine's " desire to justify, excuse or at least explain . . . his conduct." (*People v. Mickey* (1991) 54 Cal.3d 612, 650); this desire apparently was a product of the emotional turmoil Valentine was experiencing.

Valentine argues Donaldson's reply was deceptive because it led him to believe that his statement would not be used against him.[7] [" Whether intentional or inadvertent, Donaldson's state of mind is irrelevant to the issue of whether Valentine voluntarily made the statement. (*Moran v. Burbine, supra*, 475 U.S. at p. 423.)] We disagree, but assuming arguendo that the reply was deceptive, any deception did not render the confession involuntary and invalid because (1) it was not a "motivating cause of the decision to confess" (*People v. Boyde* (1988) 46 Cal.3d 212, 238), and

(2) "the deception was not of the type reasonably likely to procure an untrue statement," (*In re Walker* (1974) 10 Cal. 3d 764, 777). "The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." (*People v. Ray* (1996) 13 Cal.4th 313 340.)

Put simply, Donaldson's words "you can tell me if you want" did not lure or trick Valentine to make a statement that he otherwise would not have made. Valentine's confession was a product of his desire to confess, apparently caused by his emotional state. The requisite proximate causation is lacking here.

The record indicates Valentine is an extremely intelligent young man who displayed an understanding of his constitutional rights when he was given his *Miranda* admonishment. He also demonstrated a level of sophistication in this area when he questioned whether police had a warrant to search the family residence. Under the totality of the circumstances presented, we conclude that at the time of the roadside statement, Valentine's decision to talk to the detectives was "entirely 'self-motivated' [citation], i.e., [ ] he freely and voluntarily [chose] to speak without 'any form of compulsion or promise of reward . . .' [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-28, questioned on another ground in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

In sum, Valentine voluntarily elected to make the roadside statement; it was the product

> of his free and deliberate choice rather than intimidation, coercion or deception.

(Pet., Ex. A at 15-19.)

As noted above, under clearly established Supreme Court law, "coercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelley*, 479 U.S. at 167. In determining whether a confession has been coerced, the court is required to consider "all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. Moreover, the Supreme Court has required a high level of coercion in order to render a confession involuntary. *See e.g. Mincey v. Arizona*, 437 U.S. 385 (1978) (finding a confession to be involuntary where defendant, while hospitalized and sedated in intensive care, was interrogated for four hours); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (finding a confession to be involuntary where a medicated defendant was questioned for over eighteen hours and was deprived of food and sleep); *Beecher v. Alabama*, 389 U.S. 35 (1967) (finding a confession to be involuntary where police officers held a gun to defendant's head).

The state court examined all the circumstances surrounding Valentine's confession, as mandated by *Schneckloth*, 412 U.S. at 226. The state court acknowledged that Donaldson's response was "ambiguous and/or evasive, – a simple "yes" would have been a correct answer," but found that while Donaldson could have given a more complete and less misleading answer, his response was not inaccurate. (*See* Pet., Ex. A at 16.) Valentine had asked for a lawyer and yet could still talk to the detectives

if he so chose. The court also examined other circumstances surrounding Valentine's confession and found that on balance those circumstances established his confession as a product of his own free will. The state court noted that Valentine, not the detectives, initiated the contact that led to his confession, and that Valentine was "highly emotional" and "wanted to get something off his chest" when he asked the detectives to pull over and gave his statement. (Pet., Ex. A at 17.) The state court determined that Valentine's decision to confess was "apparently . . . a product of the emotional turmoil [he] was experiencing." (*Id.*) Finally, the state court wrote that Valentine was an "extremely intelligent young man" who exhibited an understanding of his constitutional rights when they were explained to him and chose to invoke his right to remain silent and his right to an attorney, (*Id.* at 19.)

This Court may not substitute its judgment for that of the sate court. *See* 28 U.S.C. § 2254(d); *Woodford v. Visciotti*, 123 S.Ct. at 360 (quoting *Lindh*, 521 U.S. at 333, n.7). Under this standard, this Court finds that the state court's determination that Donaldson's response did not overcome Valentine's free will is not contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Pet., Ex. A at 17; *see also Connelley*, 479 U.S. at 164 (noting that "[a]bsent police conduct *causally related to the confession*, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.") (emphasis added). Thus, Valentine is not entitled to relief on this claim.

3. Violation of Valentine's Miranda Rights[9]

Valentine next claims that his confession was obtained in violation of his rights under *Miranda*. Specifically, Valentine argues that Donaldson's response to his question, which occurred after Valentine invoked his right to an attorney, subjected Valentine to the functional equivalent of interrogation. Therefore, Valentine maintains, Donaldson was required to re-*Mirandize* him and to obtain a waiver of his *Miranda* rights before interrogating him.

The state appellate court determined that Valentine validly invoked his right to an attorney after he was advised of his *Miranda* rights and that Valentine, not the officers, initiated contact after that invocation. (*See* Pet., Ex. A at 20-21.) This Court must defer to those factual findings under 28 U.S.C. 2254(e) because Valentine has not rebutted them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (West Supp. 2002); *see also Jeffries*, 114 F.3d at 1499. The only issue in dispute, therefore, is whether Donaldson's response, "Well, you asked for a lawyer, but you can tell me if you want," was the functional equivalent of interrogation under *Innis* and its progeny. If it was, the officers were required to obtain a

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[9] Valentine also argues that Donaldson's statement, "You are under arrest for murder," was the functional equivalent of interrogation under *Innis* and required *Miranda* warnings. However, as the state appellate court correctly found, Donaldson's statement, "You are under arrest for murder," are words normally attendant to arrest and custody, which is specifically exempted from the "functional equivalent" definition. (Pet., Ex. A at 38-38; *Innis*, 446 U.S. at 301.) Moreover, Donaldson's statement cannot be said to be reasonably likely to elicit an *incriminating* response. It is equally likely to elicit an *exculpatory* response, or *no* response. Thus, the state appellate court's ruling was not an unreasonable application of *Innis*, and Valentine is therefore not entitled to habeas relief on this claim. *See Williams*, 529 U.S. at 412-13.

valid waiver of Valentine's Fifth Amendment rights before the interrogation, in order to use his confession against him at trial. *See Edwards*, 451 U.S. at 484-485; *Bradshaw*, 462 U.S. at 1043-45. If it was not, then Valentine's statement was "volunteered," and could be validly admitted. *See Innis*, 446 U.S. at 300 (citing *Miranda* ("'Volunteered statements of any kind are not barred by the Fifth Amendment. . . .'")).

In its opinion, the state court did not address the question whether Donaldson's response was the functional equivalent of interrogation. Rather, the state court appears to have assumed that the response was "interrogation," and thus focused its analysis on two other issues: whether Donaldson's response constituted a sufficient advisement of Valentine's Fifth Amendment rights, and whether Valentine had validly waived those rights. (Pet., Ex. A at 21-26.) Because the state court did not address the merits of whether Donaldson's response was the functional equivalent of interrogation under *Innis*, this Court must independently review the record to determine whether the state court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law. *Lockyer*, 123 U.S. at 1174-75; *Delgado*, 223 F.3d at 981-83.

In determining whether words or actions by an officer constitute interrogation, *Innis* requires this Court to focus on Valentine's perception of the events. *Innis*, 446 U.S. at 301-02; *United States v. Crisco*, 725 F.2d 1228, 1230 (9th Cir. 1984). Something more than "subtle compulsion" or the striking of a responsive chord in the defendant is necessary. *Id.* at 303. As part of this inquiry, this Court is also required to weigh whether the suspect was peculiarly susceptible to the officer's appeal, whether the suspect was

unusually disoriented or upset, and the general circumstances surrounding the statement. *United States v. Thierman*, 678 F.2d 1331, 1335 (9th Cir. 1982) (citing *Innis*, 446 U.S. at 302-03). The officer's intent in making the statement, though not determinative, is also relevant to the inquiry. *Crisco*, 725 F.2d at 1232. Moreover, "[t]he standard for determining whether an officer's comments or actions constitute the 'functional equivalent' of interrogation is quite high. . . ." *United States v. Foster*, 227 F.2d 1096, 1103 (9th Cir. 2000).

Valentine argues that Donaldson's answer cannot be evaluated in isolation, but must be viewed in the context of Valentine's question, "I want to tell you something. Can it be used against me?" When viewed in this light, the Court agrees that Donaldson's response, "You asked for a lawyer, but you can tell me if you want," was highly suggestive. However, the Court concludes that Donaldson's response was not sufficiently evocative to constitute interrogation.

Donaldson's response was not sufficiently accusatory or threatening to be interrogation. *See United States v. Moreno-Flores*, 33 F.3d 1164 (9th Cir. 1994) (finding no interrogation where officer warned defendant he was "in a lot of trouble" and was facing a serious prison sentence, transported defendant to jail for the night, then questioned defendant the next morning as to "how his night was."); *Shedelbower v. Estelle*, 885 F.2d 570 (9th Cir. 1989) (finding no interrogation where officer confronted defendant with false identification which implicated him in a rape and murder); *Crisco*, 725 F.2d 1228 (finding no interrogation where during arrest of defendant, officer confronted him with details of his meeting with defendant in an undercover capacity). Nor did Donaldson play on any

peculiar susceptibility of Valentine's. *See, e.g., Foster*, 227 F.3d 1096 (finding no interrogation where officer engaged defendant in a conversation about his interest in music and guitars, despite allegation that the topic was defendant's "weakness"); *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982) (finding no interrogation where defendant had exhibited extreme desire not to implicate others and officers said in defendant's presence that it was "too bad" they had to involve defendant's family and girlfriend). Although Valentine was clearly extremely distressed when he confessed, there is no evidence he was "unusually disoriented." *See Thierman*, 678 F.2d at 1335 (citing *Innis*, 446 U.S. at 302-03). Moreover, unlike the officer in *Thierman*, who admitted that by making the comments about Thierman's family and girlfriend he was trying to get him to respond, Donaldson's stated intent in making his comment was to answer Valentine's question, not to deceive him. *See Crisco*, 725 F.2d at 1232; Lodgment No. 1, Vol. 4 at 503.

The state court's decision finding that Valentine's *Miranda* rights were not violated was not contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Lockyer*, 123 U.S. at 1174; *Delgado*, 223 F.3d at 981-83. He is therefore not entitled to relief as to this claim.

D. Due Process Violation – Admission of Valentine's Search Warrant Question

Valentine next claims his due process rights were violated by the trial court's permitting the prosecution to introduce evidence of his invocation of his Fourth Amendment rights as substantive evidence of his guilt.

After his arrest and while he was being transported from the Valentine residence to the police department, Valentine posed the following question to Officer McNamara: "I don't mean to quibble over details here, but did you have a search warrant?" (*See* Lodgment No. 1, Vol. 24 at 4367.) Valentine sought and received a pretrial ruling preventing the prosecution from using the statement in their case-in-chief, noting that "[t]he court finds defendant was within his rights to inquire about the existence of a search warrant," and that "any minimal relevance in asking the question is substantially outweighed by the potential prejudice to the defendant." (Lodgment No. 2, Vol. 5 at 923-24.)

The court reversed its ruling, however, after Valentine's testimony, finding that because Valentine had testified about his conversation with McNamara and omitted his question about the search warrant, the prosecution was within its rights to question Valentine about the entirety of the conversation, including Valentine's question about the existence of a search warrant. (Lodgment No. 1, Vol. 24 at 4305-13.) The prosecutor then questioned Valentine about his conversation with McNamara:

> Q. When Officer McNamara was driving you to downtown headquarters from your home, you said something else that you didn't tell us about in yesterday's testimony; isn't that right?
>
> A. I answered the questions yesterday.
>
> Q. When the defense attorney asked you what you said that was on tape in the car, you said that you were asked what you were under arrest

for and you said, "They told me I was under arrest for murder. I don't know what the hell he's talking about"; isn't that right?

A. Yes.

Q. You remember that part?

A. Yes.

Q. Then you said that Officer McNamara wouldn't answer any of your questions; isn't that right?

A. Yes.

Q. He said to wait till downtown; isn't that right?

A. Yes.

Q. Didn't you leave out a – part of the statement that you made, in fact, the very first thing you said in the transport?

A. Yes.

Q. You said, "I don't mean to quibble over details here, but did you have a search warrant?" Isn't that right?

A. That's correct. I saw three people going into the house, and as we were leaving I just asked, "I don't mean to quibble here, but there was a search warrant, right?" It was just what came to my mind because I had never – I saw three people just sort of charging into our house.

Q. You were worried about what they would find that would tie you to the murders; isn't that right?

MR. IREDALE: Objection to the form of the question. Objection on the same grounds as stated before.

THE COURT: Well, the form of the question, sustained. BY MS. BLAIR:

Q. Were you still really worried about your parents when you were being transported to downtown headquarters?

A. I had gotten an idea of what possibly had happened. I didn't want to accept it. That's why I was asking Officer McNamara.

Q. Were you worried about them still?

A. Yes, I was very scared when I left that house.

Q. You didn't say, "Go on in. See if you can find anything that will help you with whatever it is you're here for," did you?

MR. IREDALE: Objection on the aforestated grounds.

THE COURT: Overruled.

(*Id.* at 4366-68.)

Defense counsel made a second objection to the evidence which was overruled. The prosecutor then asked Valentine about his statement a second time:

Q. You were very quiet during that long drive downtown to police headquarters, weren't you.

A. Yes.

MR. IREDALE: Objection. I object to the form of the question.

THE COURT: Overruled.

BY MISS BLAIR:

Q. Your answer was "Yes"?

A. Yes.

Q. The very first thing you asked about, though, was "I don't want to quibble over details here, but did you have a search warrant?" Isn't that what you asked?

A. I asked that.

(*Id.* at 4379.)

Before closing arguments, the defense asked for and received a limitation on the prosecutor's closing argument which prevented her from using Valentine's search warrant question as substantive evidence of his guilt. (Lodgment No. 1, Vol. 25 at 4591-92.) The court agreed that the question could not be used as consciousness of guilt, but rather only to put the conversation between Valentine and McNamara in context. (*Id.* at 4593.) In closing, the prosecutor argued as follows:

> It just happens that when he's placed under arrest for murder he says nothing, nothing. "You're under arrest for murder." Silence. The next time he speaks is when he's chitchatting with Officer McNamara about the water tank on the hill, as he is not asking who was murdered. He's not asking, "Why am I placed under arrest for murder?" because he knows. He knows why they're there. He just doesn't know how they found out and what they know and he's going to be careful. That evidence is consistent with a guilty person. Can you imagine, if I told you were placed under arrest for murder, and you don't ask any questions?

> Now, later in the drive, in the context of his first question, "I don't want to quibble, but you did have a search warrant," in the context of that, he then later – and the silence is very telling in that transport of 15 to 20 minutes. He then later says, when the officer says, "Well, don't you know what you're under arrest for?" "Oh, yeah, I do. I don't know what's going on." He says he doesn't know what's going on. This is much later, after the fact of being placed under arrest.

(*Id.* at 4787.)

The state appellate court found no error in the admission of Valentine's search warrant question as evidence of guilt or in the prosecutor's argument:

> [T]he search warrant comment was highly relevant. Valentine testified on direct examination that after he was awakened by the police telephone call and went outside he did not understand what was happening, he was stunned when Donaldson told him he was under arrest for murder, and he became frightened by the thought that his parents were dead. The " 'I don't mean to quibble over details here, but did you have a search warrant?' " comment belied the picture painted during direct examination of
>
> Valentine as not knowing why police were there and not thinking clearly after a deep sleep.
>
> We also reject Valentine's argument that the prosecutor in her closing argument improperly used Valentine's search warrant comment as evidence of consciousness of guilt. The prosecutor said Valentine's silence upon being told he was under arrest was consistent with a guilty person;

> she did not state the search warrant comment was. The court and counsel were alert to this issue, having previously discussed that it would be improper to use the search warrant comment as evidence of consciousness of guilt, and it is telling that defense counsel did not lodge an objection on this ground during the prosecutor's closing argument. The trial court, which earlier had indicated it would intervene if the prosecutor made an improper argument on this issue, did not find it necessary to do so.
>
> The trial court initially ruled the search warrant comment could not be introduced during the prosecution's case-in-chief because its probative weight was outweighed by its potential for prejudice. It was proper for the court to revisit the pre-trial ruling after Valentine's direct examination. Certainly, the probative value of the evidence had changed significantly. Also, the court gave the limiting instruction.
>
> The court did not abuse its discretion in allowing the prosecution to cross-examine Valentine about the search warrant comment. (Evid. Code, § 352.)

(Pet., Ex. A at 33-35.)

Valentine argues that the prosecution's use of his question about the existence of a search warrant, which he claims was an invocation of his Fourth Amendment rights, as substantive evidence of his guilt violated his due process rights. As discussed above, *Griffin* and *Doyle*, hold that the prosecution may not use a defendant's invocation of his Fifth Amendment rights as substantive evidence of his guilt in their case-in-chief. *See Doyle*, 426 U.S. 610;

Griffin, 380 U.S. 609. The Court reasoned that without this protection, a defendant could not assert his or her Fifth Amendment rights without fear of repercussion, and the rights would become illusory. *Griffin*, 380 U.S. at 612-15; *Doyle*, 426 U.S. at 611-14. There is no clearly established Supreme Court law, however, which prevents the prosecution from using a defendant's invocation of his Fourth Amendment rights as substantive evidence of his guilt in their case in chief.

The Ninth Circuit applied *Griffin* and *Doyle's* rationale to a Fourth Amendment context in *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). *See Duhaime*, 200 F.3d at 600. In *Prescott*, the government sought to prove the defendant's guilt by introducing evidence that she refused to permit officers into her home without a warrant. *Id.* at 1347. The Ninth Circuit found that "[i]t was prejudicial error to permit the government to prove, as evidence of the offense charged, that Prescott declined to unlock her door when the officers did not have a warrant." *Id.* at 1349. Moreover, the court held, "[a] passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Id.* at 1351; *see also United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976) (citing *Griffin v. California*, 380 U.S. 609 (1965) (holding that "[t]he prosecutor's comments on the Taxes' refusal to consent to a search of their trucks was misconduct.")). Other circuits have also considered the issue and have come to similar conclusions. *See United States v. Runyan*, 290 F.3d 223, 249-50 (5th Cir. 2002); *United States v. Moreno*, 233 F.3d 937, 940-01 (7th Cir. 2000); *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *United States v. Thame*, 846 F.2d 200, 205-08 (3d Cir. 1988); but cf. *United States v. McNatt*, 931 F.2d 251,

256-58 (4th Cir. 1991) (finding Fifth Amendment cases distinguishable and finding defendant's claim that officers planted drugs in his truck invited the prosecution's comment in closing argument that defendant had refused to consent to a search of his truck).

Here, the question the Court must answer is whether the state court unreasonably applied, *Griffin* and *Doyle* by failing to extend those cases to Valentines' Fourth Amendment question. *See Williams*, 529 U.S. at 407. The cases which applied *Griffin* and *Doyle* to a Fourth Amendment context sought to protect a defendant's actual *assertion* of his or her Fourth Amendment rights. Indeed, in each of the cases in which Courts have extended *Griffin* and *Doyle* to a Fourth Amendment context, the defendant expressly invoked his Fourth Amendment rights by refusing to consent to a search. *See Runyan*, 290 F.3d at 249-50; *Moreno*, 233 F.3d at 939-40; *Thame*, 846 F.2d at 206-08; *Prescott*, 581 F.2d at 1350-51. Valentine's question, "I don't mean to quibble over details here, but did you have a search warrant?" was not an express invocation of his Fourth Amendment rights. Rather, it was a question as to whether the government had proceeded through the proper constitutional channels, had gathered enough evidence to establish probable cause, and whether they had obtained a search warrant. Moreover, the jury was instructed that "Mr. Valentine's statement regarding a search warrant was admitted for the purpose of placing the conversation in context" and that they could "consider such evidence for that limited purpose only." (Lodgment No. 1, Vol. 6 at 1085; *see also Estelle*, 502 U.S. at 75 (noting that any limiting instructions may mitigate against a finding that admission of evidence rendered the proceedings unfair).

The state court's decision was not contrary to clearly established Supreme Court law, nor did it "unreasonably refuse to extend a [clearly established legal] principle to a new context where it would apply." *Williams*, 529 U.S. at 407. He therefore is not entitled to relief on this claim.

E. Due Process Violation – Cumulative Effect of Erroneous Evidentiary Rulings

In his next claim, Valentine argues that a series of erroneous evidentiary rulings by the state trial court deprived him of his federal due process rights. (*See*, Pet. at 71-80.) Valentine claims that the cumulative effect of these errors rendered his trial unfair and violated his federal due process rights. (*Id.*)

"It is well settled that a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey v. Rocha*, 194 F.3d 971, 977-78 (9th Cir. 1999) (citing *Henry v. Kernan*, 177 F.3d 1152, 1159 (9th Cir. 1999)). The test for determining whether an error was so prejudicial that it violates due process "is similar to the analysis used in determining, under *Brecht*, whether an error had 'a substantial and injurious effect' on the outcome." *Thomas v. Hubbard*, 273 F.3d 1164, 1179 (9th Cir. 2001). Any possibility of prejudice may be mitigated by the trial court's limiting instructions. *See Estelle*, 502 U.S. at 75; *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990). However, while any single error may not have deprived a defendant of due process when considered alone, a series of errors may have the cumulative effect of denying a defendant due process when considered together. *See Whelchel v. Washington*, 232 F.3d 1197, 1212

(9th Cir. 2000). Thus, the first step in this Court's analysis must be whether the state trial court committed error in each of the incidents alleged. Then, if error did occur, the Court must determine whether the cumulative effect of the errors was so prejudicial as to render Valentine's trial fundamentally unfair. *See Thomas*, 273 F.3d at 1180.

1. Restriction of Cross-Examination and Exclusion of Evidence

Valentine makes three claims related to cross-examination and exclusion of defense evidence. He claims the state trial judge impermissibly restricted cross-examination related to the credibility of Detective Donaldson and Officer Atwood. Further, Valentine claims the state trial court incorrectly excluded defense evidence related to officers' personnel files. *See* Pet'rs P. & A. at 66-80.)

a. Exclusion of evidence of Donaldson's visit to Valentine

Valentine's counsel attempted to cross-examine Donaldson regarding a visit Donaldson made to Valentine in jail two days after Valentine invoked his right to counsel. The purpose of the questioning was to refute Donaldson's "claim that he did not question the defendant or would not have questioned the defendant or that this statement was not made in response to questioning from him" and to show that "[Donaldson] was asking questions, which refutes his claim that he wouldn't have asked questions and didn't ask questions." (Lodgment No. 1, Vol. 18 at 3485, 3486.) The state trial judge prevented Valentine's counsel from questioning Donaldson about the visit,

ruling it was hearsay. (*Id.* at 3486-87.) At the close of testimony that day, Valentine's counsel addressed the issue again. The trial judge asked the prosecutor to determine the subject matter of Donaldson's conversation with Valentine on August 5 and report back in the morning. The court would then determine whether to allow Valentine's attorney to question Donaldson more fully about the August 5 visit. (*Id.* at 3496-98.) Neither attorney addressed the question the next morning. (*Id.* at 3499.)

On appeal, Valentine argued that the state trial court's ruling was erroneous. The state appellate court first noted that by failing to accept the judge's offer to revisit the question, the claim of error was not preserved. (Pet., Ex. A at 61.) However, the court went on to address the merits of the claim nonetheless:

> Assuming arguendo the assignment of error was properly before us, we agree the court's initial hearsay ruling was incorrect – Valentine was offering the evidence not for the truth of the matter of the statement but rather as evidence of Donaldson's verbal act – improperly asking questions of an arrestee. However, such error would be harmless. Donaldson's credibility was sorely put at issue by the defense on numerous occasions. It is not reasonably probable a result more favorable to Valentine would have been reached if the defense could have questioned Donaldson about the subject matter of the August 5 conversation that was not tape-recorded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

(Pet., Ex. A at 61-62.)

The first question to be addressed is whether the state trial court's decision to exclude the evidence as hearsay

was error. This Court agrees with the state appellate court that the trial court incorrectly characterized the evidence Valentine sought to admit as hearsay. (Pet., Ex. A at 61.) The trial court believed defense counsel wanted to introduce Valentine's statements to Donaldson during Donaldson's jail visit. It is clear, however, that defense counsel sought to introduce not Valentine's statements but the fact that Donaldson visited Valentine in jail. (*See* Lodgment No. 1, Vol. 18 at 3486.[10] As the state appellate court noted, "Valentine was offering the evidence not for the truth of the matter of the statement but rather as evidence of Donaldson's verbal act – improperly asking questions of an arrestee." (Pet., Ex. A at 61-62; *see also Anderson*, 417 U.S. at 219, 221.)

Valentine argues here, as he did in state court, that this error reached constitutional dimensions. A major part of Valentine's defense was to cast doubt on the validity of his confession by challenging Donaldson's credibility. Valentine argues that the exclusion of defense evidence by restricting cross-examination of Donaldson improperly bolstered Donaldson's credibility by preventing Valentine from placing before the jury evidence that Donaldson had not scrupulously honored Valentine's invocation of his right to an attorney, as Donaldson claimed. Valentine further argues that the restriction simultaneously damaged Valentine's

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[10] In response to the prosecutor's argument that defense counsel was seeking to introduce hearsay statements by Valentine through Donaldson's testimony, defense counsel said, "I don't care about the response. I want to show that he was asking questions, which refutes his claim that he wouldn't have asked questions and didn't ask questions." (Lodgment No. 1, Vol. 18 at 3486.) The court ruled that "[t]his is pure unadulterated hearsay and that's what it's being offered for. The objection is sustained." (*Id.*)

credibility by preventing him from placing before the jury evidence that supported his claims that Donaldson and Verduzco constantly badgered him for a statement during the ride from the police station to the jail. (Pet'rs P. & A. at 71-74.)

"Clearly established federal law" holds that the right to present [evidence and] witnesses is essential to due process; it is also guaranteed by the compulsory process clause of the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *Chambers*, 410 U.S. at 294; *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Denham v. Deeds*, 954 F.2d 1501, 1503 (9th Cir. 1992). The Ninth Circuit has noted, however, that "[t]he defendant's right to present evidence . . . is not absolute. *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983); *see also Tinsley v. Borgs*, 895 F.2d 520 (9th Cir. 1990). Thus, the exclusion of defense evidence is not always error. "The defendant's general right to present evidence is undeniably strong; yet the states' legitimate interest in reliable and efficient trials is also compelling. [citations omitted]." *Perry*, 713 at 1451.

To resolve the conflict between these interests, the Ninth Circuit has identified five factors that should be considered when deciding whether a court's exclusion of defense evidence violates the constitution: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the defense." *Tinsley*, 895 F.2d at 530; *see also Duhaime*, 200 F.3d at 600. The importance of the evidence must then be balanced against the state's interest in exclusion. *Id.* To overcome the state's strong interest in the administration of its trials, the circumstances of the

exclusion must be "unusually compelling." *Perry*, 713 F.2d at 1452.

The Court's analysis begins by weighing the *Tinsley* factors. With respect to the first factor, the probative value of the evidence on the central issue, there were two "central issues" at Valentine's trial: the reliability and accuracy of the DNA blood evidence linking Valentine to the crimes, and the relative credibility of Donaldson, Verduzco and Valentine regarding the alleged confession. Each of these bodies of evidence tended to reinforce and corroborate the other.

On direct and cross-examination, Donaldson testified that he did not ask Valentine any questions during Valentine's processing or during the ride from the police station to the jail. (Lodgment No. 1, Vol. 18 at 3437-38; 3451-52; 3472-74; 3479-80; 3540-41.) Verduzco testified that he and Donaldson stopped asking Valentine questions after he requested a lawyer because they knew they were not allowed to under such circumstances. (Lodgment No. 1 Vol. 19 at 3619-23.) However, Donaldson admitted in a pretrial motion hearing that he had visited Valentine in jail after his arrest and after he had requested an attorney. (Lodgment No. 1, Vol. 3 at 444.) Cross-examination about this visit would have cast doubt on Donaldson's claim that he did not question Valentine during processing or during the ride from the police station to the jail, which in turn would have cast doubt on Donaldson's credibility as a witness. Thus, the first factor weighs in favor of Valentine.

The second and third factors weigh even more strongly in Valentine's favor. Donaldson admitted he had visited Valentine in jail and had asked him questions. (Lodgment No. 1, Vol. 18 at 3487-89.) Thus, the evidence

was very reliable. Further, because the testimony was very straightforward, the evidence was easily capable of evaluation by the trier of fact.

Factor four, however, is mixed. The cross-examination sought by the defense was somewhat cumulative of evidence the defense was able to bring in in other ways. As the state court noted, "Donaldson's credibility was sorely put at issue by the defense on numerous occasions." (Pet., Ex. A at 62.) Further, even within the limits placed on defense counsel's questioning of Donaldson, counsel was able to establish that Donaldson had visited Valentine in jail, asked him questions and tape recorded his answers, despite the fact that Valentine had invoked his right to an attorney. (Lodgment No. 1, Vol. 18 at 3487-89.) However, the evidence defense counsel sought to introduce through cross-examination went precisely to the defense claim that Donaldson's rendition of the interaction between he and Valentine was not credible, and supported Valentine's testimony that Donaldson had repeatedly questioned and badgered him after Valentine had invoked his right to an attorney, both during the trip from the police station to the jail and during Donaldson's August 5 visit with Valentine in jail. (Lodgment No. 1, Vol. 23 at 4284-86.)

Finally, factor five weighs in Valentine's favor. As noted above, the relative credibility of Donaldson and Valentine was a central issue pertaining to the veracity and credibility of the alleged confession. Donaldson's post-arrest visit to Valentine undermined Donaldson's credibility and boosted Valentine's. This in turn detracted from the reliability of Valentine's confession, a major part of the prosecution's case.

Under *Tinsley*, the Court is also required to consider the state's reasons for excluding the evidence. *See Tinsley*, 895 F.2d at 530. As noted above, the state court erroneously concluded the evidence was hearsay. Thus, there is no discernible state interest for excluding the evidence. Thus, on balance, the *Tinsley* factors weight in Valentine's favor. The Court therefore concludes that the restriction on the cross-examination of Donaldson violated Valentine's due process rights. *See Tinsley*, 895 F.2d at 530.

b. Restriction of cross-examination of Detective Officer Atwood

Valentine next contends that his cross-examination of Detective Atwood was unconstitutionally restricted in violation of the Sixth Amendment. During a pretrial hearing on the motion to suppress evidence seized during the search of the Valentine residence, Atwood was asked questions regarding whether officers had used the Valentines' ladder to look inside the residence prior to executing the search warrant. Atwood testified as follows:

> Q. There's a ladder that's shown here. Was a ladder used at the time that you were at the house?
>
> A. I'm not sure.
>
> Q. Did anybody climb up on the roof?
>
> A. Not that I know of.
>
> . . . .
>
> Q. Let me ask you a question about that ladder, Officer Atwood. See if you can refresh your recollection. Did you not place the ladder against the

front wall of the house to look through the top of the front windows?

A. No, sir.

Q. You're sure of that?

A. Yes, sir.

(Lodgment No. 1, Vol. 2 at 116, 127.)

At trial, defense counsel again cross-examined Atwood about the ladder. Atwood testified as follows:

Q. So the ladder was used while you were at the house, true?

A. Yes, sir, it was.

Q. As a matter of fact, you placed the ladder with Sergeant Sullivan up against the house.

A. Sir, I may have helped Sullivan – or Sergeant Sullivan move the ladder and I may have held it, but I didn't climb on it.

Q. But did you place the ladder?

A. I don't recall placing it.

Q. You testified before at a hearing related to this matter?

A. Yes, sir, I have.

(Lodgment No. 1, Vol. 18 at 3415.)

At this point, the prosecutor objected on relevance grounds and the court sustained the objection. Defense counsel asked to make an offer of proof at a later time, indicating that his purpose in asking the questions was to show a prior inconsistent statement. (*Id.*) The court

granted the defense request, listened to counsel's argument, but upheld its earlier ruling. (*Id.* at 3443-44.)

On appeal, the state appellate court did not address the Sixth Amendment question. Rather, it found that under California law, the trial court was well within its discretion to restrict Atwood's cross-examination:

> There was no error; the court acted within its discretion. Valentine was attempting to impeach Atwood on a collateral matter. "The general discretion of the judge under [Evidence Code section] 352 to exclude any evidence in order to prevent confusion of issues or undue consumption of time . . . applies; hence, [the court] may either allow or refuse to permit impeachment on a collateral matter in any particular situation." (3 Watkin, Cal. Evidence, *op. cit. supra*, § 1983, pp. 1939-1940.)

(Pet., Ex. A at 62-63.)

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) the Supreme Court noted that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* at 679. Here, the state appellate court found that the trial court was within its discretion to restrict defense counsel's cross-examination of Atwood with regard to the use of the ladder at the Valentine residence because it was a "collateral matter." (Pet., Ex. A at 62.)

This ruling was not contrary to, nor an unreasonable application of, *Van Arsdall*. The impeachment value of

Atwood's prior testimony about the ladder was extremely low for two reasons. First, the subject matter of the testimony was not particularly relevant, pertaining as it did to a "collateral matter." (*See* Pet., Ex. at 62.) Second, Atwood's testimony at the suppression motion hearing and the trial was not inconsistent. At the suppression motion hearing, Atwood testified that he was "not sure" whether the ladder was used during the search of the Valentine residence and that he did not place the ladder against the front wall of the Valentine residence and look through the windows. (Lodgment No. 1, Vol. 2 at 116, 127.) At trial, Atwood testified that he "may have helped Sergeant Sullivan move the ladder" and "may have held it," but that he did not recall placing the ladder. (Lodgment No. 1, Vol. 18 at 3415.) Thus, as it pertained to Atwood's credibility, the impeachment value of the prior testimony about the placement of the ladder was marginal at best. Under these circumstances, the state appellate court's decision was not contrary to, nor an unreasonable application of the clearly established Supreme Court law described in *Van Arsdall*, and no error occurred. *See Williams*, 529 U.S. at 412-13.

c. Denial of access to information about the officers' personnel file

Valentine's next claim relates to his request for discovery of relevant impeachment material in Donaldson's and Verduzco's personnel files. In pretrial motions, Valentine moved to discover relevant information in Donaldson's and Verduzco's personnel files under the authority of *Pitchess v. Superior Court*, 112 Cal. 3d 531

(1974).[11] The basis for Valentine's request was his contention that "he was illegally arrested, that illegal searches and seizures of his home were conducted, that he was improperly interrogated, and that his alleged confession was involuntary and a fabrication." (Lodgment No. 2, Vol. 1 at 155.) The state trial court agreed to conduct an *in camera* review of Verduzco's and Donaldson's personnel files, but placed a five-year limit on the files subject to review under the authority of California Evidence Code section 1045(b)(1),[12] finding that "incidents potentially occurring more than five years before defendant's arrest are remote in time and, therefore, would have minimal relevance." (Lodgment No. 2, Vol. 5 at 910.) After reviewing the files, the trial judge determined that there was no discoverable material in the files. (Lodgment No. 1, Vol. 6 at 823; Lodgment No. 2, Vol. 7 at 1316.) The state trial judge agreed to review the records a second time after Verduzco testified about his disciplinary record, and again

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[11] *Pitchess* permits a defendant to move to discover information contained in law enforcement officers' personnel files which is relevant to issues in the current case, such as prior incidents of falsifying information or planting evidence. If a defendant is entitled to such discovery, the judge conducts an *in camera* review of the files to determine if any discoverable information is contained therein. Any relevant evidence is then turned over to the defendant. *See Pitchess*, 11 Cal. 3d 531.

[12] California Evidence Code section 1045(b)(1) reads:

> (b) In determining relevance the court shall examine the information in chambers in conformity with Section 915, and shall exclude from disclosure:
>
> (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction which is the subject of the litigation in aid of which discovery or disclosure is sought.

Cal. Evid. Code § 1045(b)(1) (West 1999).

found no discoverable material. (Lodgment No. 1, Vol. 19 at 3618, 3824; Lodgment No. 2, Vol. 7 at 1356, 1359.)

On direct appeal, Valentine contended, as his does in this Petition, that the imposition of the five-year limit on discovery of material in the officers' personnel files was a violation of his right to present relevant evidence under state and federal law. (*See* Lodgment No. 2, Vol. 5 at 898-900.) The state appellate court found no error, relying exclusively on California law:

> Third, Valentine complains the court placed an arbitrary five-year limit on reviewing the discipline files of Donaldson, and Verduzco pursuant to his *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion. The court conducted an in camera review of Donaldson's and Verduzco's files going back five years from the time of Valentine's arrest. This was in compliance with Evidence Code section 1045, subdivision (b)(1), which excludes complaints or discipline imposed more than five years before the event that is the subject of the litigation. In *City and County of San Francisco v. Superior Court (Lemus)* (1981) 125 Cal.App.3d 879, 883, the Court of Appeal rejected a due process attack on the five-year limitation of Evidence Code section 1045, subdivision (b)(1). The Court of Appeal found the statute "'is procedurally fair and reasonably related to a proper legislative goal.'" (*City and County of San Francisco v. Superior Court (Lemus), supra*, 125 Cal.App.3d at 884.)
>
> Valentine also asks this court to review the sealed reporter's transcript of the court's in camera review. We have done so, and are satisfied that it contains no information that was not placed before the jury.

(Pet., Ex. A at 63.)

Valentine appears to argue here that the five-year limitation of California Evidence Code section 1045(b)(1) potentially denied him access to exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As support for this contention, Valentine points to Verduzco's testimony. Verduzco testified on cross-examination that eight years prior to Valentine's arrest, Verduzco had been suspended for twenty days for failure to write and file reports. (Lodgment No. 1, Vol. 19 at 3594-95.) Defense counsel asked for and received a second review of the files. (*Id.* at 3617-18.) Verduzco then testified on redirect examination that he had received a reprimand for shooting his unmarked police car. (*Id.* at 3624.) Valentine claims Verduzco's equivocal testimony supports his contention that had the files been reviewed for incidents that may have occurred more than five years before Valentine's arrest, additional exculpatory information would have emerged.

In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Evidence is favorable to the accused if it helps the defendant or hurts the prosecution. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.'" *United States v. Bagley*, 473 U.S. 667, 682 (1985). In determining reasonable probability, the Court looks at any negative

effect the suppression of evidence might have had on the preparation of defendant's case. *Bagley*, 473 U.S. at 683. This should be assessed in light of (1) the difficulty of speculating on defense strategy and the course the trial would have taken had the suppressed evidence been disclosed and (2) the totality of the circumstances. *Id.*

Valentine has not identified what "material evidence" he was denied. Instead, he asks this Court to speculate that had the officers' files been examined beyond the five-year limit, they would have contained evidence supporting his contention that Donaldson and Verduzco had procured an involuntary confession or fabricated Valentine's confession. Such a showing does not meet the requirements of *Brady*. Moreover, Valentine was afforded a full opportunity to cross-examine Donaldson and Verduzco regarding their past conduct and disciplinary records. There was no due process violation, and the state court's decision was therefore neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *See Williams*, 529 U.S. at 412-13.

d. Exclusion of defense blood evidence

Valentine next argues that his due process rights were violated when he was prevented from introducing evidence demonstrating how far one drop of blood could be spread. Valentine sought to introduce the testimony of Manny Lopez, the defense investigator. Lopez was to "testify about taking a drop of his blood and spreading it on a steering wheel to show the volume of blood on a steering wheel from a small amount of blood." (Lodgment No. 1, Vol. 23 at 4216-18.) This evidence would have supported the defense's contention that the blood inside the Valentines'

Dodge truck came from a cut Kenneth Valentine had sustained on his hand prior to the murders, and not from Alexander Valentine as he left the murder scene. (*See id.* at 4302-03.) The prosecution objected to this proposed evidence on the basis of relevancy because there was no evidence Kenneth Valentine had sustained a cut on his hand prior to the murders. (*Id.* at 4216-18.) The state trial judge sustained the objection. (*Id.* at 4218.) Defense counsel renewed his request following Alexander Valentine's testimony that Kenneth Valentine had sustained a cut on his hand while moving furniture near the end of July, several days before the murders, and had driven home in the Dodge truck. (*Id.* at 4249-50.) The judge sustained the objection again. (*Id.* at 4302-03.) Defense counsel renewed his request a third time, emphasizing that the purpose of the evidence was to counter the prosecution's alleged claim that only a person with a large amount of blood on his hands, in this case presumably Alexander Valentine following the murders, could have deposited the amount of blood which was found inside the Dodge truck. (Lodgment No. 1, Vol. 25 at 4582-88.) The judge denied the request a third time. (*Id.* at 4588-89.)

Valentine argues that the state judge abused his discretion under California law by excluding this information. (Pet. at 78-79.) Questions of state law, however, are not cognizable on federal habeas review. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); 28 U.S.C. §§ 2241(c)(3), 2254(a).

To the extent Valentine claims a violation of his federal due process rights, this Court must apply the *Tinsley* factors outlined above. *Tinsley*, 895 F.2d at 530. The first factor, the probative value of the evidence on the central issue, weighs in Valentine's favor. As previously

noted, the two central issues were the validity of Valentine's confession and the validity of the blood evidence tying Valentine to the murders. The blood drop evidence was probative with respect to both of these bodies of evidence. Valentine's credibility was central to the case. The prosecution sought to portray Valentine as manipulative liar. The defense sought to portray him as a victim of lying police officers and of circumstance. The blood drop evidence would have helped Valentine's defense by providing physical evidence supporting his claim that blood consistent with Kenneth Valentine found on the Dodge truck's keys, steering wheel and gearshift, as well as on a shirt and jeans, came from a cut on Kenneth Valentine's hand. This evidence would have bolstered Valentine's credibility and lessened the value of the prosecution's DNA evidence.

The second factor also weighs in Valentine's favor. *See Tinsley*, 895 F.2d at 530. Lopez would have testified that he had extracted blood from his finger and that he was able to spread that drop over a significant area of the interior of a truck similar to the Dodge truck located at the Valentine residence. (Lodgment No. 1, Vol. 23 at 4216-18.) Lopez would have been subject to cross-examination. Thus, the evidence would have been relatively reliable. The jury would also have been able to evaluate the evidence with ease, satisfying the third factor.

The fourth factor is mixed. Lopez's testimony was not the sole evidence on the issue of whether a cut on Kenneth Valentine's hand was the source of the blood inside the truck. Alexander Valentine himself testified that Kenneth Valentine had cut his hand a few days prior to the murder and had then driven the Dodge truck, using the keys. (Lodgment No. 1, Vol. 23 at 4249-50.) The excluded evidence,

however, sought to bolster Valentine's testimony and credibility, which was central to the defense.

The fifth factor, however, does weigh in Valentine's favor. A major focus of Valentine's defense was a challenge to the blood evidence that linked him to the murders. The blood drop evidence would have provided an alternative explanation for the presence of blood in the Dodge truck. Thus, on the whole, the *Tinsley* factors weigh in Valentine's favor.

The Court must also "balance the importance of the evidence against the state's interest in exclusion." *Tinsley*, 895 F.2d at 530. The state interest, as expressed by the state appellate court's opinion upholding the state trial court's exclusion of the evidence, is the judge's power to exclude evidence where its probative value is substantially outweighed by the risk of undue prejudice, of confusing the issues, or of misleading the jury. (*See* Pet., Ex. A at 64; Cal. Evid. Code § 352.) It is difficult to imagine how admitting the blood drop evidence interfered with the state's interest in a reliable and efficient trial in this case. Thus, the state interest in this case is not particularly strong.

As noted above, to outweigh this interest, the circumstances of the exclusion must be "unusually compelling." The blood drop evidence would have supported one of Valentine's main contentions, that the blood consistent with Kenneth Valentine found on the Dodge truck keys, the steering wheel, the gearshift, on clothes found in the Valentines' house, and in a bathroom was deposited by Kenneth Valentine when he cut his finger a few days before the murders. It is difficult to say, however, that the blood drop evidence was the kind of "unusually compelling" evidence, the exclusion of which would violate due

process. *See Perry*, 713 F.2d at 1452. The jury was capable of determining on its own, using common sense and experience, how far one drop of blood could be spread. Moreover, the blood drop evidence did not "necessarily exonerate" Valentine; rather, it supported his explanation for the blood found in the Dodge truck, on the clothes and in the bathroom. Under these circumstances, the Court cannot say that the state court's decision regarding the exclusion of the blood drop evidence rose was contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Williams*, 529 U.S. at 412-13; *Spivey*, 194 F.3d at 977-78.

e. Exclusion of the luminol photograph

Finally, Valentine claims the state court violated his due process rights by refusing to admit a photograph of one of the presumptive blood tests performed on the Valentine's bathtub. Gary Avery, a forensic evidence specialist, testified that he performed a presumptive blood test called luminol on the bathtub, and saw a positive result on the back corner of the tub, around the edge of the tub, and next to the drain. (Lodgment No. 1, Vol. 14 at 2464-65; 2505-14.) Avery also testified that he had photographed the reactions, but that the photographs did not turn out very well, and that the reactions depicted in the photographs were not as strong as the reactions he witnessed during the tests. (*Id.* at 2510-11.) He further testified that "[w]hen blood reacts, it is an immediate, strong glow. When you get false reactions, whether it be oil, grease, any false reaction I've ever seen has been very dim and it goes away rather quickly." *Id.* at 2514.

On cross-examination, defense counsel asked Avery about the photographs. In particular, defense counsel questioned Avery about one photograph which showed a very strong reaction to the metal drain. (*Id.* at 2518-19.) Avery testified that the photograph fairly and accurately depicted the luminol's reaction to the metal drain, but did not accurately capture other reactions Avery witnessed. (*Id.* at 2520-21.) When counsel attempted to move the photograph into evidence, the prosecution objected that there was no foundation for the photograph because Avery had not testified that the photograph was a fair and accurate representation of the luminol testing. The court sustained the objection. (*Id.* at 2521.) Counsel asked the judge to revisit his ruling about the photograph just prior to the close of testimony that day, which the judge agreed o do. (*Id.* at 2549-50.) The next day, following argument, the judge sustained his earlier ruling excluding the photograph. (*Id.* at 2562-63.) Valentine argues that this exclusion violated his due process rights because it prevented him from impeaching Avery's credibility. (Pet. at 79-80.) The state appellate court, citing no authority, found no error, agreeing with the state trial court that there was insufficient foundation to admit the photograph because Avery "testified the photographs did not turn out well and did not accurately represent what he saw." (Pet., Ex. A at 64.)

In its analysis, the Court must again apply the *Tinsley* factors. The excluded photograph was probative with respect to the reliability of the blood evidence found in Valentine's bathroom. *See Tinsley*, 895 F.2d at 530. The photograph's reliability, however, was not wholly established. Avery testified it fairly and accurately represented the metal drain's reaction to the luminol. He also testified

that it did not fairly represent the other luminol reactions he had witnessed. *See Id.*; Lodgment No. 1, Vol. 14 at 2521-23. The photograph, was, however, readily capable of evaluation by the trier of fact. *See Tinsley*, 895 F.2d at 530. While the photograph was not the sole evidence regarding the reaction of luminol to metal and other non-blood substances, the photograph was perhaps a more vivid and persuasive depiction of the luminol reaction to the drain and therefore defense counsel's contentions. *See Tinsley*, 895 F.2d at 530. However, while a challenge to the luminol testing was important, it was not "a major part of the attempted defense. *See Tinsley*, 895 F.2d at 530. Thus, on the whole, the *Tinsley* factors are evenly balanced with respect to the luminol photograph.

The state's interest, on the other hand, was significant. The state appellate court upheld the exclusion because the proper foundational requirements were not met. As the Court in *Perry* noted,

> [o]ur common rules of evidence . . . have been justified by long experience. [citations omitted]. The state interests which they embody have already been weighed and found to be compelling; only the most urgent considerations, such as those in *Chambers*, can outweigh them. A defendant must show that his interest clearly outweighs the state's before we will interfere with routine procedural matters.

Perry, 713 F.2d at 1453.

Moreover, the excluded evidence was not "unusually compelling." *See Id.* As discussed above, the state trial judge in *Chambers* excluded evidence that a person other than defendant had confessed to the crime. *Chambers*, 410 U.S. at 302. The excluded evidence in Valentine's case is

not as compelling. Unlike *Chambers*, the evidence did not exonerate Valentine. Rather, it served to impeach a prosecution witness about the result of one scientific test. Further, the defense was afforded a full opportunity to impeach the witness with regard to the results of that test, and was quite successful in doing so. Under such circumstances, the state court's decision denying Valentine's claim was not contrary to, nor an unreasonable application of, clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412-13.

2. Admission of Evidence

Valentine also argues that the state trial court erred by admitting certain pieces of evidence. As noted above, "a state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process." *Spivey*, 194 F.3d at 977-78. The test for determining whether an error was so prejudicial that it violates due process "is similar to the analysis used in determining, under *Brecht*, whether an error had 'a substantial and injurious effect' on the outcome," and any possibility of prejudice may be mitigated by the trial court's limiting instructions. *Thomas*, 273 F.3d at 1179; *see also Estelle*, 502 U.S. at 75.

a. Admission of Valentine's false statements regarding his girlfriend having AIDS

As part of their case in chief, the prosecution sought to present three witnesses who testified that Valentine had falsely told them his girlfriend had AIDS or was HIV

positive. (Lodgment No. 1, Vol. 15 at 2680-82; Vol. 18 at 3375, 3390-93.) One witness, Kimmie Bui, testified Valentine told her his girlfriend had committed suicide as a result of being HIV positive. (Lodgment No. 1, Vol. 18 at 3393.) Valentine objected to this evidence as improper character evidence. The prosecution, however, argued that the evidence was relevant to motive and to defendant's state of mind "and the lengths to which he would go to gain what he wanted, whoever he needed to throw down along the way, whether it be his girlfriend's reputation and her very life, telling people she died. . . ." (Lodgment No. 1, Vol. 15 at 2673.) The state trial judge permitted the testimony, finding that the testimony was highly relevant in determining Valentine's motive or lack of motive. (*Id.* at 2675.) The trial judge also noted that under California Evidence Code section 352, the probative value of the evidence clearly outweighed any prejudice associated with it. (*Id.* at 2676.) Further objection by the defense was also overruled on the same grounds. (Lodgment No. 1, Vol. 18 at 3367-73.)

Valentine argues that the admission of this testimony violated his due process rights. The state court of appeal agreed with the trial court and found that the admission was proper:

> The trial court has broad discretion in ruling on evidentiary matters. (*People v. McIntyre* (1981) 115 Cal.App.3d 899, 911.) We find no abuse of discretion.
>
> Valentine relies on *United States v. Brooke* (9th Cir. 1993) 4 F.3d 1480, which found error in admitting evidence the defendant, on trial for hiring someone to deliver a pipe bomb to her ex-lover's new girlfriend, elicited sympathy by

> falsely telling people she had cancer. The Ninth Circuit Court of Appeals found the danger of unfair prejudice from the evidence outweighed its probative value, noting "[l]ying about having cancer is a particularly egregious violation of social convention, likely to provoke an instinct to punish separate and apart from any relation of the fraud to the elements of the charged crime." (*Id.* at p. 1487.) We are unpersuaded. First, federal decisions are not controlling on matters of state law. Second, Valentine's lies about his girlfriend, contemptible as they may be, pale in significance to the negative impact of the charges themselves – a double parental murder.

(Pet., Ex. A at 55-56.)

The state appellate court decision failed to address under what theory evidence that Valentine lied about his girlfriend having AIDS or HIV would be relevant to whether he killed his parents. Notwithstanding this "hole" in reasoning in the state court's decision, this Court is not permitted to substitute its judgment for that of the state court. *See* 28 U.S.C. § 2254(d); *Woodford*, 123 S.Ct. at 360. In light of evidence which was properly admitted against Valentine, the state court's decision permitting this additional evidence did not render Valentine's trial fundamentally unfair. *Williams*, 529 U.S. at 412-13; *Spivey*, 194 F.3d at 977-78.

b. Admission of evidence of Valentine's misbehavior in high school

During Valentine's cross-examination, the prosecutor asked Valentine about his performance in high school:

Q. Now, the reason you got an F – it wasn't due to your lack of ability. It was because you were causing trouble in the class and were a problem for the teacher; isn't that right?

MR. IREDALE: Objection as to relevance; objection, 1101.[13]

THE COURT: Not to this question. If it goes any further I would agree with you. Overruled.

Is that the reason?

THE WITNESS: From what I understood, I was removed from the class. I had missed several class periods, and there was a behavior problem in the class.

BY MS. BLAIR:

Q: In fact, you vandalized the classroom, correct?

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[13] California Evidence Code section 1101 states:

(a) Except as provided in this section and in Sections 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution of an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Cal. Evid. Code § 1101 (West 1999).

MR. IREDALE: Objection, your Honor; 1101, 352.

THE COURT: Sustained.

(Lodgment No. 1, Vol. 24 at 4374.)

Valentine argues that this evidence, like the evidence of his false statements about his girlfriend, was wrongly admitted in violation of his due process rights. The state appellate court found as follows:

> Concerning why he failed two classes in high school, the court permitted the prosecutor to ask one question on cross-examination: Did he fail his high school class because he was "causing trouble in the class and [was] a problem for the teacher."
>
> Valentine had testified on direct examination he did not fear being thrown out by his parents for flunking out of Harvey Mudd because he also did poorly his first year of high school. Thus, Valentine opened the door to the prosecutor's inquiry. Also, the court did not allow the prosecutor to further pursue the Issue.

(Pet., Ex. A. at 56.)

As with the evidence of Valentine's false statements about his girlfriend having AIDS, there seems to be no discernible connection between the prosecutor's questions about Valentine's misbehavior in high school and the murder of his parents. However, even if erroneous, the admission of this evidence did not render the proceedings fundamentally unfair. *See Thomas*, 273 F.3d at 1179; *Spivey*, 194 F.3d at 977-78. The reference was extremely brief. After an independent review of the record, the Court finds that the state appellate court's determination was

not contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13; *Delgado*, 223 F.3d at 981-82; *Spivey*, 194 F.3d 977-78.

c. Admission of luminol, phenolphthalein and hemastix testing

Finally, Valentine argues that the admission of tests that showed the presumptive presence of blood inside the Valentine residence violated his due process rights. As discussed above, forensic evidence specialist Avery testified that he performed presumptive blood tests on several areas of the Valentine house and in the Dodge truck located outside the residence. (Lodgment No. 1, Vol. 14 at 2407-10, 2416-21, 2440-41, 2444-45, 2447-50.) Annette Peer, a criminalist with the San Diego Police Department, also testified about presumptive blood tests she performed on various items. (Lodgment No. 1, Vol. 17 at 3077-79, 3084-85, 3090-91, 3098, 3106-07, 3108-10, 3113-16, 3118, 3121-22, 3130-34, 3139-43, 3145, 3164, 3167-68.)

Valentine argues that there was no foundation established for the presumptive blood tests, and that they were therefore wrongfully admitted. The state appellate court found no error:

> To the extent that there was error in the admission of the hemostick test, any error was harmless. This was a presumptive test for blood, which identified possible blood samples for further testing. The possibility that the hemostick test presumptively identified non-blood did not affect the result in this case in any manner.

(Pet., Ex. A at 58.)

Even if error occurred in the admission of these tests, the error did not render the proceedings fundamentally unfair. *See Thomas*, 273 F.3d at 1179; *Spivey*, 194 F.3d at 977-78. Defense counsel thoroughly cross-examined both Avery and Peer regarding the limitations of the presumptive blood tests, in particular the fact that other materials could give false positive results and that further testing was needed to confirm that blood was in fact present on the items tested. (Lodgment No. 1, Vol. 14 at 2460-77, 2514-23; Vol. 17 at 3180-85, 3302-24; Vol. 18 at 3349-52.)

3. Cumulative effect of errors

Valentine argues the cumulative effect of these evidentiary rulings deprived him of a fair trial. (*See* Pet'rs P. & A. at 80.) The state appellate court, citing no authority, determined that none of the evidentiary rulings, either by themselves or cumulatively, constituted error. (Pet., Ex. A at 64.)

The Court has concluded that the restriction on cross-examination of Donaldson was constitutional error. However, having thoroughly reviewed the record, the Court cannot say that there was sufficient error in the exclusion or admission of evidence, either individually or cumulatively, to establish a violation of Valentine's due process rights. *See Williams*, 529 U.S. at 412-13; *Whelchel*, 232 F.3d at 1212. Valentine is not entitled to relief as to this claim.[14] *Id.*

[14] The effect of the restriction on the cross-examination of Donaldson, however, is considered in Part I of this R&R.

F. Due Process Violation – Prosecutorial Misconduct

Valentine argues that the prosecutor committed misconduct by interjecting herself as an unsworn witness, making gestures and gratuitous comments that were prejudicial and improper, and failing to abide by court rulings. (Pet. at 6-7; Pet'rs P. & A. at 80-93.) The state appellate court did not cite any authority for its conclusion that Valentine's prosecutorial misconduct claim was "devoid of merit," but instead made a conclusory assessment of Valentine's claim:

> First, we note that none of the prosecutor's purported errors constituted prosecutorial misconduct.
>
> Second, none of the asserted errors by the prosecutor – considered individually or cumulatively – affected the fairness of the trial.
>
> Third, we have carefully examined the record of this two-month trial, including 4,682 pages of reporter's transcript, 1,377 pages of clerk's transcripts, and found this was an intensely fought trial between two very competent advocates, both of whom zealously represented their clients. If at times one of them in his or her zeal overstepped the line and failed to strictly abide by the courts' rulings, the conduct was isolated and did not interfere with Valentine's right to a fair trial. Valentine received a fair trial.

(Pet., Ex. A at 64.)

To establish a claim of prosecutorial misconduct, a petitioner must show: (1) the prosecutor's actions amounted to constitutional error; and (2) the error was not harmless. *Greer v. Miller*, 483 U.S. 756, 765-66 (1987). In

determining whether there was constitutional error, the Supreme Court has stated that the misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *see also Thompson v. Borg*, 74 F.3d 1571, 1577 (9th Cir. 1996) (citing *Darden v. Wainwright*, 477 U.S. 168, 168 (1986)). The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The reviewing court must look at the trial as a whole and place the prosecutor's remarks in context. *See Greer v. Miller*, 483 U.S. 756, 765-66 (1987).

1. Prosecutor's interjection of herself as an unsworn witness

Valentine first claims that the prosecutor repeatedly presented herself as an unsworn witness. In particular, Valentine argues that the prosecutor used cross examination of witnesses to personally testify, personally impeach witnesses and personally verify aspects of the investigation.

It is well established that prosecutors have "a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). In particular, "a prosecutor may not impart to the jury his belief that a government witness is credible." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998) (citing *United States v. McKoy*, 771 F.2d 1207,1210-11 (9th Cir. 1985)). Prosecutors can improperly "vouch" for a witness

in two ways: "The prosecutor may either 'place the prestige of the government behind the witness or . . . indicate that information not presented to the jury supports the witness's testimony.'" *Id.* (citing *Roberts*, 618 F.2d at 533 (alteration in original)). Moreover, prosecutors are bound by the "advocate-witness rule," which prevents attorneys from taking the stand as a witness in a case they are litigating. *Id.* (citing *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985)). The policy behind both the prohibition against vouching and the advocate-witness rule "[is] related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *Id.* This policy "'appl[ies] equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains 'witness veracity' in a case in which he appears as an advocate for the government.'" *Id.* (citing *United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986)).

Valentine first claims the prosecutor acted as an unsworn witness by indicating to the jury she had been personally involved in the investigation. Specifically, Valentine points to the prosecutor's questioning of forensic specialist supervisor Gary Avery regarding the sound and luminol testing performed at the Valentine residence as part of the investigation. During these interchanges, the prosecutor made references to the fact that she had been present at the tests. With regard to the sound test, the prosecutor asked who was present in the house with Avery when he was startled by the loud noises produced by the test. Avery responded that the prosecutor was. (*See* Lodgment No. 1, Vol. 14 at 2452-54.) With respect to the luminol testing, the prosecutor asked why "we" had to perform

the test at night, then asked whether other investigators who were present at the test were shown the photographs of the luminol testing. Avery responded that luminol testing had to be performed at night, and that the luminol reactions did not photograph well. (*Id.* at 2504-05.) The prosecutor then asked whether the luminol photographs had turned out well, to which Avery responded that they had not. The prosecutor continued, asking "[Y]ou can't really see the reaction that you could see if you were present, is that correct?" (*Id.* at 2510-11.) Valentine's trial counsel objected, and at a later time, made a broad objection to the prosecutor's placing herself in the investigation. (*Id.* at 2561-62.)

Valentine argues that these actions transformed the prosecutor into an unsworn witness regarding the loudness of the sound test and the fact that the luminol testing did not photograph well. (*See* Pet'rs P. & A. at 82, n. 68.) With regard to the sound testing, the prosecutor's actions were not sufficiently egregious to constitute prosecutorial misconduct. *See Darden*, 477 U.S. at 181. The prosecutor did elicit testimony that she had been present during the sound tests, but she did not communicate her perception of the tests. (Lodgment No. 1, Vol. 14 at 2452-54.)

Her actions with regard to the luminol testing, however, are more problematic because they placed her as an unsworn witness to a matter that was in dispute. Criminalist Gary Avery testified on direct examination that blood reacts very strongly to luminol testing, and that while other substances, such as metal, will react to the testing, they do not give very strong reactions. (*Id.* at 2514.) Defense counsel questioned Avery about one of photographs which showed a very strong reaction to a metal drain, which Avery testified depicted the luminol's

reaction to the metal drain, but did accurately capture other reactions. (*Id.* at 2520-21.) The trial judge refused to receive the photograph into evidence, sustaining the prosecutor's objection that it lacked the proper foundation. (*Id.* at 2521.) The prosecutor's questions placed her as an unsworn witness to the luminol reactions, thereby improperly bolstering Avery's testimony. However, although improper, the prosecutor's actions were not sufficiently egregious to constitute misconduct. *Darden*, 477 U.S. at 181; *Early*, 123 S. Ct. at 365.

Valentine next claims that the prosecutor inserted herself as an unsworn witness by impeaching defense witnesses Linda Ann Litle and Irene Davis with personal knowledge of her conversations with them. (Lodgment No. 1, Vol. 22 at 4027-34; 4091-92.) Litle was an important defense witness because her testimony supported Valentine's claim that Newsome, not he, killed Diane as the result of a business dispute. Litle testified that there had been an ongoing dispute between Newsome and Diane over commissions, that Newsome had frequently argued with Diane, and that Newsome would become extremely angry during these arguments. As a result, Litle testified, Diane was afraid of Newsome. In addition, Litle testified that commission information was stored on the computers that were missing from the business. She also testified that Diane and Alexander Valentine had a healthy and loving mother-son relationship. (Lodgment No. 1, Vol. 21 at 3920-72.) Davis' testimony focused on telephone conversations she had with Valentine the night of the murders. She testified that she had spoken with Valentine several times during the night, and that both of them were worried and upset that Diane and Kenneth had not returned home. (*Id.* at 4080-95.)

During Litle's cross-examination, the prosecutor confronted her with transcripts of interviews in which Litle said she noticed that a pipe wrench was missing from a peg board inside Diane's business. When Litle denied having made the statements, the prosecutor began asking questions that placed her as a witness to Litle's pre-trial interview statements. (*Id.* a 4027-28.) The trial court cautioned the prosecutor that "taking this tack, which is your prerogative, potentially puts you right in the middle of being a witness in this case." The prosecutor disagreed, and continued questioning Ms. Litle in this manner. (*ad.* at 4028-34.) Near the end of this exchange, the prosecutor asked Ms. Litle, "Miss Litle, in fact, you never told me anything about that and the first I heard of it was when the trial started; isn't that right?" (*Id.* at 4031.) Counsel objected to the prosecutor's questions, and the court sustained the objection. (*Id.* at 4031-32.) The prosecutor then asked several more questions in which she impeached Litle with her personal knowledge. (*Id.* at 4032-33.) The prosecutor also asked Davis questions that placed her as a witness to Davis' pre-trial interview statements. (*Id.* at 4091-92.) For example, the prosecutor asked Davis whether it was true that she didn't want hear the evidence in the case. When Davis denied this, the prosecutor began her next question by asking, "When I've talked to you and other people have talked to you in the case. . . ." Trial counsel objected to the form of the question, and the objection was sustained. (*Id.*)

The prosecutor's questions did place her before the jury as an unsworn witness. By continually impeaching Litle and Davis with personal knowledge of her conversations with them, she placed before the jury her version of their conversation, then coupled it with the "prestige and

prominence of the prosecutor's office." *See Edwards*, 154 F.3d at 921. This was improper. However, the prosecutor's actions did not "so infect . . . the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 77 U.S. at 181; *Early*, 123 S. Ct. at 365. Valentine is not entitled to relief on this claim.

2. Prosecutor's comments regarding defense counsel

Valentine also argues that the prosecutor committed misconduct by impugning defense counsel's character before the jury. Specifically, Valentine claims that the prosecutor falsely told the jury that defense counsel had not turned over reports, that she made gratuitous comments and suggestive facial gestures, demeaned defense counsel's exercise of compulsory process, made "self-aggrandizing" statements to the jury that suggested evidence was being kept from them and failed to abide by court rulings.

a. Prosecutor's comment to the jury that she had not received "reports"

Prosecutors stray beyond the bounds of appropriate advocacy when they improperly suggest to a jury that defense counsel has acted in an illegal or unethical manner without evidence to support those allegations. *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983.) Valentine alleges the prosecutor committed misconduct by "falsely telling the jury that [he] had not provided discovery reports while making a baseless speaking objection." (Pet'rs P. & A. at 84.) This claim is based upon an exchange between

counsel that occurred during cross-examination of prosecution witness Matthew Rackstein. As part of his cross-examination, defense counsel used a report as a reference point. The prosecutor objected, first as hearsay and then by stating that "I believe he's reading from a report that hasn't been provided to the prosecution." (Lodgment 1, Vol. 16 at 3012.) When the court sustained the objection on hearsay grounds, the prosecutor said, "But I would ask – we provided copies of our reports to the defense. I have not received copies of reports." (*Id.* at 3012-13.) The court ordered defense counsel to turn the report over, and defense counsel asked if he could do so at the break. The prosecutor stated that she wanted the report "now." When defense counsel indicated he did not have a copy of the report, the court took a recess. (*Id.* at 3013.)

At the break, defense counsel argued that under California law he was not required to turn the report over. The court initially ruled that the Rackstein report and any other similar reports were to be turned over. After researching the issue, however, the court determined that the earlier ruling had been in error, and that no further reports were to be turned over. (Lodgment 1, Vol. 17 at 3052-54; *see also Izazaga v. Superior Court*, 54 Cal. 3d 356 (1991) and *Hubbard v. Superior Court*, 66 Cal. App. 4th 1163 (1997)).

The prosecutor should not have made the statement at issue in front of the jury because it improperly suggested that defense counsel had wrongfully failed to turn over material to the prosecution. As with the other instances of alleged prosecutorial misconduct, however, the actions did not "so infect . . . the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *Early*, 123 S. Ct. at 365.

b. Demeaning defense counsel's exercise of compulsory process

Valentine's next allegation of misconduct involves the prosecutor's alleged "demeaning the defense's exercise of compulsory process" by asking Newsome whether he knew "why the defense dragged you into court in this case." (Pet'rs P. & A. at 87; Lodgment No., Vol. 23 at 4181.) Defense counsel objected to the question as argumentative and "simply unfair." The court sustained the objection. (Lodgment No. 1, Vol. 23 at 4181.)

As stated above, prosecutors commit misconduct when they unfairly attack the credibility or ethics of defense counsel. *United States v. Rodrigues*, 159 F.3d 439, 450-51 (9th Cir. 1998); *Bruno*, 721 F.2d at 1195. In *Bruno*, the prosecutor argued to the jury that defense counsel had tampered with a witness by pressuring her to change her testimony, implied that the defendant's hiring of counsel was indicative of his guilt, and implied that defense counsel had lied and fabricated evidence for profit. *Bruno*, 721 F.2d at 1194. The Ninth Circuit found that because the remarks were so improper and extensive, the error was sufficient to reverse the conviction. *Id.* at 1195.

The prosecutor's actions in Valentine's case are unlike those condemned by the Court in *Bruno*. The prosecutor in Valentine's case asked one objectionable question of Newsome, which was sustained as "argumentative." Moreover, in *Bruno*, the prosecutor blatantly accused defense counsel of acting unethically and illegally. Here, the prosecutor's question suggested the defense brought Newsome to court without justification. But that suggestion was inherent in the conflicting theories presented by the defense and prosecution during the trial. Under such circumstances, the state appellate court's decision was not

contrary to, nor an unreasonable application of, clearly established Supreme Court law. *See Early*, 123 S. Ct. at 365.

c. Statements suggesting evidence was being kept from the jury

Valentine also alleges that the prosecutor committed misconduct by suggesting to the jury that evidence was being kept from them. The exchange Valentine complains of occurred during the testimony of Arturo Campa, who was one of the officers called to Diane and Kenneth's house on the night of the murders:

> Q. Detective Campa, when you directed Detective Donaldson to place the defendant under arrest, was that based on all the information you had gathered from Miralani, in talking to people there, up through everything that you discovered at the location of Arroyo Sorrento?
>
> A. Yes.
>
> Q. After that, was the case submitted to the D.A.'s office to review for issuance of charges?
>
> MR. IREDALE: I object to that. I object to that; 352[15], irrelevant.
>
> MS. BLAIR: Based on his questions, your Honor, I believe he opened the door on that.

[15] The reference is to California Evidence Code section 352, which states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid Code § 352 (West 1999).

> THE COURT: Look, this has already been ruled on. I think its irrelevant for the purposes of the trial. Sustained.
>
> MS. BLAIR: Your Honor, regarding the previous pretrial ruling, based on his questions –
>
> THE COURT: The objection was sustained. If you have other questions, ask them.
>
> MS. BLAIR: It would be at sidebar, your Honor.
>
> THE COURT: We're not going to debate it.
>
> MS. BLAIR: I don't want to ask the question now, but may we address the pretrial ruling at sidebar? He's alluded to it, and I think the jurors should know.
>
> THE COURT: We go on now, please. (Lodgment No. 1, Vol. 16 at 2937.)

"While the government may not 'suggest that information not in evidence supports its case,' *United States v. Badger*, 983 F.2d 1443, 1455 (7th Cir. 1993), [citations omitted], prosecutorial misconduct violates due process only if evidence is presented which 'taken as a whole' gives a jury a 'false impression.' *Alcorta v. Texas*, 355 U.S. 28 [citations omitted] (1957) (per curiam)." *Downs v. Hoyt*, 232 F.3d 1031, 1038 (9th Cir. 2000). As with several other alleged incidents of prosecutorial misconduct in this case, the prosecutor's actions may have been improper, but they do not rise to the level of prosecutorial misconduct. *Darden*, 477 U.S. at 181. The comment did not give the jury a false impression of the evidence. *See Downs*, 232 F.3d at 1038. Thus, the prosecutor's comment did not constitute prosecutorial misconduct sufficient to warrant habeas relief. *See id.*; *Darden*, 477 U.S. at 181 (misconduct must have so infected the trial with unfairness as to make the

resulting conviction a denial of due process."); *Greer*, 483 U.S. at 765-66 (reviewing court must look at trial as a whole and place prosecutor's remarks in context); *Early*, 123 S. Ct. at 365.

3. Prosecutor's facial gestures

Valentine also argues that the prosecutor exhibited facial gestures before the jury which constituted misconduct. Indeed, the state trial judge noted that the prosecutor was prone to making facial gestures. (*See* Lodgment No. 1, Vol. 16 at 3016) (emphasis added.) The court admonished the prosecutor to refrain from making such gestures in the future. (*Id.*) There is no indication in the record, however, as to what kind of facial gestures the prosecutor exhibited, or what effect those facial gestures had upon the jury. Further, there is no evidence that the prosecutor exhibited facial gestures after she was admonished by the court. Thus, under these circumstances, this Court cannot say that the state court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Early*, 123 S. Ct. at 365.

4. Reference to prosecutor's client as "the People"

Next, Valentine argues that the prosecutor committed misconduct by improperly suggesting that a court ruling preventing her from asking certain questions harmed her client, "the People." This, he claims, "worked to prejudice petitioner."

The conduct Valentine complains of occurred when the prosecutor attempted to question Detective Valle about the number of homicides he had investigated, the number of homicides that go unsolved, and whether his compensation

was tied to the number of homicides he solved. (Lodgment 1, Vol. 10 at 1896-99.) Defense counsel objected to many of these questions, and the objections were sustained. (*Id.*) Following this, the prosecutor stated, "I just want to request [a sidebar], your Honor, for my client, the People. I just want to be able to show no bias." (*Id.* at 1899.) The court denied the request. (*Id.*)

The prosecutor's conduct did not constitute misconduct. While the prosecutor's actions may have violated the state trial judge's order against speaking objections, it was not error of constitutional magnitude. It did not "so infect . . . the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; *Early*, 123 S. Ct. at 365.

5. Failure to abide by court rulings

Finally, Valentine alleges that the prosecutor committed misconduct by failing to abide by court rulings. Petitioner claims that the prosecutor engaged in a pattern of objectionable questioning, included restating questions to which an objection had been sustained and posing questions that contained objectionable information. (*See* Pet'rs P. & A. at 90-93.) Valentine claims this pattern constitutes prosecutorial misconduct sufficient to have denied him a fair trial. (*Id.*)

The prosecutor's actions may have been unprofessional, but they were not sufficiently erroneous to have infected the entire trial with unfairness. *See Darden*, 477 U.S. at 181. Viewing the trial as a whole, as this Court is required to do under *Smith*, this Court agrees with the state court's view that "[i]f at times one of [the attorneys] in his or her zeal overstepped the line and failed to strictly

abide by the courts' rulings, the conduct was isolated and did not interfere with Valentine's right to a fair trial." (Pet., Ex. A at 65.) Thus, after an independent review of the record, this Court finds the state court's decision was not contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Darden*, 477 U.S. at 181; *Early*, 123 S. Ct. at 365.

G. Fifth Amendment Violation – Failure to Instruct on the Reliability of Valentine's Confession

Valentine next claims that his federal due process rights were violated by the trial court's refusal to give an instruction directing the jury to determine the voluntariness of Valentine's confession. Specifically, Valentine argues that the state trial court should have given a jury instruction based on *Crane v. Kentucky*, 476 U.S. 683 (1986).

In *Crane*, the United States Supreme Court held that a defendant has a federal constitutional right to present evidence bearing upon the reliability and credibility of a confession. *See Crane*, 476 U.S. at 690. The defendant retains this right regardless of whether the trial court has determined at a separate hearing that the confession was voluntary. *Id.* at 689. In particular, the Supreme Court found that "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." *Id.* at 688 (emphasis in original). Moreover, the Court found, "evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *Id.* "In the absence of

any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91.

Although Valentine was permitted to introduce evidence surrounding his confession, the trial court refused to give a defense-crafted jury instruction telling the jury they could consider the circumstances surrounding the confession in evaluating its voluntariness. (*See* Pet'rs P. & A. at 38-42; Lodgment No. 2 at 1054.) On direct review, the state appellate court, citing *Crane* as the basis of its analysis, found that while the trial court properly rejected the proposed instruction because it misstated the law, it "should have deleted the objectionable parts of the proffered instruction and instructed the jury that it could consider evidence of the circumstances of the confession in evaluating voluntariness." (*See* Pet., Ex. A at 26, 30.) The state appellate court further found, however, that the error was not prejudicial for four reasons. First, other jury instructions directed the jury to "view the confession with caution." (*Id.* at 30.) Second, Valentine's guilt could easily have been established even without the confession. (*Id.* at 30-31.) Third, Valentine was not restricted in any way from presenting evidence bearing on the reliability of his confession. (*Id.* at 31-32.) Fourth, defense counsel argued in closing that Valentine's confession was unreliable. (*Id.* at 32.) Thus, the state appellate court found that while the trial court committed error, the error was harmless under *People v. Watson*, 46 Cal. 2d 818, 836 (1956) because "[i]t [was] not reasonably probable that a result more favorable to Valentine would have been reached in the absence of such error." (*Id.* at 32.)

Applying the harmless error test set out in *Watson*, the state court necessarily determined that the instructional error was one of non-constitutional magnitude. *See Pains*, 204 F.3d at 971, n. 2. Thus, the state appellate court appears to have concluded that Valentine had a constitutional right under *Crane* to present evidence regarding the reliability of his confession, which he was afforded, but that he did not have a constitutional right to a jury instruction informing the jury that they could consider that evidence in determining the reliability and veracity of Valentine's confession. (*See* Pet., Ex. A at 32.)

Crane holds that a defendant has a right to present evidence regarding the reliability of his confession. *Crane*, 476 U.S. at 690. As the state court noted, Valentine was not prevented from presenting such evidence. He presented evidence that "Donaldson and Verduzco coerced, cajoled, tricked and lied to him to obtain the confession." (Pet., Ex. A at 31.) Further, Valentine presented evidence that his confession was suspect because standard police procedures were not followed, first because, "under normal police practices [his] confession should have been tape recorded," and second because "[his] earlier statement in Officer McNamara's vehicle was tape recorded. . . ." (*Id.*) Valentine also presented evidence to show that "Donaldson's handwritten notes were suspect." (*Id.*)

Crane, however, does not explicitly require that a state trial court give a specific instruction directing the jury to consider the circumstances surrounding a confession to determine its reliability. As noted in section A(2) of this Report and Recommendation, *Henderson*, supplies the standard of review for instructional error in habeas cases, "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due

process. . . ." *Henderson*, 431 U.S. at 154; *see also Gilmore v. Taylor*, 508 U.S. 333, 343-44 (1993) (finding that the right to present a complete defense does not entitle a defendant to a particular set of jury instructions). "This standard for instruction error applies to ambiguous or omitted instructions." *Martishaw v. Woodford*, 255 F.3d 926, 971 (9th Cir 2001). Further, in determining whether an omitted instruction violated a defendant's due process rights, "[t]he significance of the omission . . . may be evaluated by comparison with the instructions that were given." *Henderson*, 431 U.S. at 156.

In *Henderson*, the defendant was accused of robbing a very intoxicated man, then forcing him to remove his pants and boots. Defendant then left the victim sitting in the middle of an unlighted rural road at approximately 9:30 p.m. on a snowy night. *Id.* at 147. A car later struck the victim and killed him. Defendant was tried and convicted of second degree murder, among other charges. *Id.* at 148. The second degree murder statute under which defendant was tried required that the jury find the defendant's conduct caused the death of another person. *Id.* at 149. The trial court failed to instruct the jury on the issue of causation. The defendant filed a habeas corpus petition in federal court alleging that this failure violated his federal due process rights because it allowed the jury to convict him without finding each element of the crime beyond a reasonable doubt. *Id.* at 151-52. The United States Supreme Court looked at the entirety of the proceedings, including the attorney's arguments and the other jury instructions given to the jury, and concluded that the failure to give the instruction did not constitute reversible error:

> There can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide. The element of causation was stressed in the arguments of both counsel. The statutory language, which the trial judge read to the jury, expressly refers to the requirement that defendants' conduct "cause(d) the death of another person." The indictment tracks the statutory language; it was read to the jurors and they were given a copy for use during their deliberations. The judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt. Whether or not the arguments of counsel correctly characterized the law applicable to the causation issue, they surely made it clear to the jury that such an issue had to be decided.

Id. at 153.

Valentine's case is similar to *Henderson*. There is no question that the credibility and reliability of Valentine's confession was a central issue which jurors had to decide. In fact, it was the centerpiece of Valentine's defense, and Valentine's counsel spent much of his cross-examination of Donaldson and Verduzco attempting to discredit the confession. (*See* Lodgment No. 1, Vol. 18 at 3454-96; Vol. 19 at 3509-23, 3556-62, 3591-3602, 3624-28.) Valentine himself testified that he had not confessed, and that the confession was manufactured by the detectives. (*See* Lodgment No. 1, Vol. 23 at 4284-88; 4399-4400.) The prosecutor cross-examined Valentine extensively about his truthfulness and about the alleged confession. (*See id.* at 4288-4300; Vol. 24 at 4313-94; 4407-14; 4416-23.) Moreover, as the state court pointed out, jurors were directed by

California Criminal Jury Instruction (CALJIC) No. 2.70[16] that they were to determine whether Valentine had actually made the statement and, if so, whether the statement was true in whole or in part. *See* CALJIC 2.70. They were also directed by CALJIC 2.70 to view evidence of Valentine's alleged confession with caution. *Id.* Thus, the jury knew that the credibility and reliability of Valentine's confession was at issue, and that they were required to determine whether the confession was credible and reliable. Under such circumstances, the state appellate court's determination that the error in failing to give an instruction based on *Crane* was harmless neither contrary to, nor an unreasonable application of, *Henderson. Early*, 123 S. Ct. at 365. Thus, Valentine is not entitled to relief on this claim. 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 412-13.

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[16] CALJIC No. 2.70 reads as follows:

A confession is a statement made by the defendant in which he has acknowledged his guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].

An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part.

[Evidence of [an oral confession] [or] [an oral admission] of the defendant not made in court should be viewed with caution.]

H. Due Process Violation – Instructional Error

Finally, Valentine argues that the state trial court erred by refusing to give a jury instruction on third party liability.

Throughout his trial, Valentine suggested that a business associate of Diane Valentine, Robert Newsome, had committed the murders because of a business dispute he had with Diane. As part of this defense, Valentine requested that the court instruct the jury on the burden of proof for this asserted defense. The trial judge refused to give either the proffered instruction or any modified instruction. (Lodgment No. 1, Vol. 26 at 4623-24.) Valentine argued on appeal that this was error, but the state appellate court, citing no state or federal authority, found no error in this decision:

> Valentine is mistaken. The jury was adequately instructed on the burden of proof and the degree of certainty required for a conviction. There was no possibility that the jury could have been misled to believe Valentine had the burden of proof to show Newsome committed the charged crimes beyond a reasonable doubt.
>
> Valentine's reliance on Evidence Code section 502, which requires the court to instruct on burden of proof, is misplaced. The statute would apply only if an evidentiary presumption were involved or the defendant were asserting an affirmative defense. Neither situation applied here.
>
> Valentine has not supplied any authority for the proposition that a defendant who is presenting evidence of a third party's liability is entitled to an instruction on the issue, and our research disclosed none. Valentine's suggestion that CALJIC

> No. 2.91 covers the issue and should have been guilty [sic] is incorrect. CALJIC No. 2.91 deals with eyewitness identification, which is not an issue in this case, and should be given only in cases where identification evidence includes eyewitness testimony.

(Pet., Ex. A at 50-51.)

Under both California and federal law, Valentine had the right to present evidence supporting his defense. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rock v. Arkansas*, 483 U.S. 44 (1987); *People v. Hall*, 41 Cal. 3d 826, 833 (1986). Valentine does not argue, however, and indeed could not argue, that he was prevented from presenting evidence that a third party committed the crime. Rather, he maintains that the state court erred by refusing to given an instruction that "clarified" the burden of proof as it related to Valentine's theory that Newsome committed the murders. Valentine argues that without this clarifying instruction, the jurors could have believed that he had to prove that Newsome committed the murders beyond a reasonable doubt before they could acquit him. (*See* Pet'rs P. & A. at 64.)

The state trial court did not commit error by refusing to instruct the jury about the burden of proof as it related to Valentine's defense. As the state appellate court noted, the jury was properly instructed that it could not convict Valentine unless it found beyond a reasonable doubt that Valentine had committed the murders. (*See* Pet., Ex. A at 50; Lodgment No. 2, Vol. 6 at 1103.) A common sense reading of this instruction required the jury to acquit Valentine if it believed someone else, namely Newsome, had committed the murders, and that belief was sufficient to create a reasonable doubt as to Valentine's guilt. Moreover,

there is nothing in the record that suggests the jury was confused about the burden of proof; thus it is mere speculation that the jury misunderstood the burden of proof as it related to Valentine's defense. Finally, Valentine's suggestion that giving CALJIC No. 2.91[17] would have corrected any misconception by the jury about the burden of proof is unpersuasive. As the state court noted, CALJIC No. 2.91 addresses the issue of eyewitness identification. (Pet., Ex. A at 51.)

The failure to give a jury instruction addressing the burden of proof as it related to Valentine's defense theory was not contrary to *Henderson* because it did not so infect the trial with unfairness as to violate due process. *See Henderson*, 431 U.S. at 154-56. Thus, Valentine is not entitled to relief as to this claim. *See Williams*, 529 U.S. at 412-13; *Early*, 123 S. Ct. at 365.

I. Cumulative Error

The Court has concluded that three errors of constitutional magnitude occurred during the course of this trial, and that the state appellate court's decision with respect to those errors was contrary to, or an unreasonable application of, clearly established Supreme Court law. *See*

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[17] CALJIC No. 2.91 reads:

> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which [he] [she] is charged. If, after considering the circumstance of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

Williams, 529 U.S. at 407, 412-13. Specifically, the Court has concluded that: (1) the admission of Valentine's post-arrest, pre-*Miranda* silence as substantive evidence of guilt and the giving of an adoptive admission jury instruction in conjunction with that evidence violated Valentine's Fifth Amendment rights, (2) the admission of DNA test result evidence as business records was a violation of Valentine's Sixth Amendment confrontation clause rights, and (3) the restriction on the cross-examination of Detective Donaldson with regard to his post-arrest jail visit to Valentine was a violation of Valentine's federal due process and Sixth Amendment confrontation clause rights. While each of these errors, by themselves, did not have a substantial and injurious effect on the verdict in this case, the Court concludes that the errors, when considered together and in the context of the trial as a whole, are significant enough to place the Court in grave doubt about the likely effect of the errors on the jury's verdict. *O'Neal*, 513 U.S. at 435. The Court therefore recommends the Petition be **GRANTED**.

VII. CONCLUSION AND RECOMMENDATION

For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered conditionally granting the Petition unless the State decides to retry Petitioner within a reasonable time.

IT IS ORDERED that no later than **August 15, 2003** any party to this action may file written objections

with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **September 15, 2003**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

DATED: 7-8-03

/s/ Larry A. Burns
HON. LARRY A BURNS
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDER VALENTINE, Petitioner-Appellee, v. EDWARD S. ALAMEIDA, JR., Warden, Respondent-Appellant.	No. 04-55208 D.C. No. CV-01-00681-NAJ Southern District of California, San Diego ORDER AMENDING MEMORANDUM DISPOSITION AND DENYING PETITION FOR REHEARING AND REHEARING EN BANC (Filed Sep. 20, 2005)

ALEXANDER VALENTINE, Petitioner-Appellee, v. EDWARD S. ALAMEIDA, JR., Warden, Respondent-Appellant.	No. 04-55365 D.C. No. CV-01-00681-NAJ

Before: FARRIS, D.W. NELSON, and TALLMAN, Circuit Judges.

The Memorandum disposition filed on August 8, 2005, is amended as follows:

The following sentence on Page 4, lines 10-14 is eliminated:

"The district court incorrectly applied *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943), in this circumstance,

because *Palmer*, an interpretation of an early federal evidentiary rule, does not establish a constitutional principle that is applicable to the states under 28 U.S.C. § 2254(d)(1). *See Early v. Packer*, 537 U.S. 3, 10 (2002)."

With the amended Memorandum disposition, the panel has voted to deny the petition for panel rehearing. Judge Tallman has voted to the deny the petition for rehearing en banc. Judges Farris and Nelson recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en bane. *See* Fed. R. App. P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions shall be entertained.

(2)

No. 05804

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER VALENTINE, *Petitioner*,

v.

JEANNE S. WOODFORD, Acting Secretary, California Department of Corrections and Rehabilitation, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE T. OETTING.
Supervising Deputy Attorney General
PAT ZAHAROPOULOS
Deputy Attorney General
State Bar No. 63282
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2209
Fax: (619) 645-2191
Counsel for Respondent

QUESTIONS PRESENTED

1. Because this Court has not addressed whether an accused's post-arrest, pre-*Miranda* silence can be used as substantive proof of guilt in the prosecution's case-in-chief, is that issue worthy of certiorari in a case controlled by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")?

2. Does the Sixth Amendment right of confrontation provide an accused the right to cross-examine the author of business records regarding DNA testing when those records were found by the state court to be trustworthy?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05804

ALEXANDER VALENTINE, *Petitioner*,

v.

JEANNE S. WOODFORD, Acting Secretary, California Department of Corrections and Rehabilitation, *Respondent*.

STATEMENT OF THE CASE

Petitioner killed his mother at her place of business on her birthday with such violent, repeated blows that she was nearly decapitated. He subsequently killed his father who had arrived to take his wife out to dinner. The bodies were discovered by the office janitor later that night. Police investigated the scene, ran vehicle registration records, and proceeded to the family residence.

At Petitioner's home, police shined a 15,000 candle power flashlight through the closed blinds, and knocked on Petitioner's bedroom window three or four times without getting a response. They obtained a telephone connection to the house, called Petitioner at 4:40 a.m., and ordered him to come out of the house. "Within a minute," he walked out the front door. He said that he had called the police because his parents had not come home from dinner. Petitioner was placed under arrest. When told he was being arrested for committing murder, he did not ask who had been murdered, or otherwise respond.

Petitioner invoked his right to counsel after receiving his *Miranda*[1] warnings, but later spontaneously confessed to police officers who were transporting him to jail.

After obtaining a warrant, police discovered a set of keys in Petitioner's bedroom; one key belonged to the truck Petitioner generally used, which was parked in the driveway of the family home. A shirt and jeans were taken from Petitioner's clothes hamper along with a blood stain from his bedroom shower. The DNA expert in San Diego who tested stains from the truck and clothing using the Polymerase Chain Reaction (PCR) method testified based on five poly markers, the father could be the source of the blood that was on the keys, gearshift and steering wheel of the truck. The shirt and jeans taken from Petitioner's clothes hamper had blood stains consistent with his father's blood. The stain from the bathtub and bath mat in Petitioner's bathroom tested consistent with his father's DNA.

The blood evidence was also tested in Maryland at Cellmark Lab using Restrictive Fragment Length Polymorphism (RFLP) which determined the blood stains on the gearshift knob matched the father's DNA. PCR and STR (Short Tandem Repeat) testing showed the father's DNA was consistent with the stain on the keys, steering wheel and shirt. The director of the out-of-state laboratory testified regarding those tests from her business records.

In high school, Petitioner had been an honor student, an obedient only child, and apparently well adjusted. Away at college, his grades were so low that he was ineligible to return to college the next year, but Petitioner told his parents he was an honor student and attempted to transfer to another college by submitting false documents. The prosecution theorized Petitioner's mother either confronted him about his Dr. Jekyll/Mr. Hyde double life or was merely getting close to discovering it, so he killed her. He then killed his father to eliminate a witness.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Petitioner was tried by jury in the San Diego Superior Court. He testified at his trial that he neither killed his parents nor ever said to anyone that he did.

During the closing argument, the prosecutor argued Petitioner's silence when arrested for "murder" indicated he knew that he was being arrested for the murder of his parents and that is why he made no comment, no protest and asked no questions.

Petitioner was convicted of the second-degree murder of his mother and first-degree murder of his father and sentenced to life in prison without the possibility of parole.

Petitioner's convictions were affirmed in an unpublished opinion on January 10, 2000, by Division One of the Fourth Appellate District of the California Court of Appeal. The California Supreme Court denied his petition for review on April 19, 2000. No review on direct appeal was sought in this Court. The underlying Petition for Writ of Habeas Corpus was filed in the United States District Court for the Southern District of California on April 18, 2001.

The district court granted the petition based on cumulative error from the use of post-arrest silence, limitations on the cross-examination of a detective and denial of cross-examination of the scientist who actually tested the blood stains in Maryland.

The Ninth Circuit Court of Appeals reversed that finding and denied the petition.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE AEDPA PREVENTS THIS COURT FROM REACHING THE CONSTITUTIONAL QUESTION WHETHER POST-ARREST, PRE-*MIRANDA* SILENCE MAY BE USED DURING THE PROSECUTION'S CASE-IN-CHIEF

There is no controlling United States Supreme Court precedent regarding the use of post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief, at least where there was no governmental interrogation. *See United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005). In fact, the District Court recognized there was no such Supreme Court precedent. Pet. App. at 74. The only way of finding constitutional error in this case is through an extension of *Griffin*.[2] It would undermine 28 U.S.C. § 2254(d)(1) as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if a federal court on habeas corpus introduced a rule not clearly establishing by this Court under the guise of extending existing law. *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

While it is true that certain principles are fundamental enough that the need to apply those rules to new factual permutations will be beyond doubt, this case does not present such a situation. *See id.* Indeed, the circuit courts are split as to the use of a defendant's post-arrest, pre-*Miranda* silence in the prosecution's case-in-chief. Compare *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997), *United States v. Whitehead*, 200 F.3d 634, 638, (9th Cir. 2000), with *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005), *United States v. Rivera*, 944 F.3d 1563, 1568 (11th Cir. 1991). Clearly, as in

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2. *Griffin v. California*, 380 U.S. 609, 977 (1965).

Yarborough, the present issue required the district court to extend, rather than simply apply, existing law. Just as clearly, such an extension of law is foreclosed by this Court's precedent. *Yarborough,* 541 U.S. at 666-67.

Even if Petitioner could generally surmount the difficulties required to extend this Court's precedent in an AEDPA-controlled case, his claim is still not worthy of review by this Court based upon the unique factual circumstances presented in the instant case. As the Ninth Circuit recognized, this Court allows the use of a defendant's pre-*Miranda* silence for impeachment purposes when a defendant testifies at trial. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982). While the prosecution first introduced Petitioner's silence during its case-in-chief, Petitioner subsequently testified. Consequently, it cannot be said that this Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), that admission of post-*Miranda* silence violates a defendant's due process rights, clearly applies to these facts.

The Ninth Circuit Court properly concluded that the State's decision to allow use of Petitioner's post-arrest, pre-*Miranda* silence as evidence of guilt was not contrary to, or an unreasonable application of, clearly established precedent from this Court because no such precedent existed. Further even if *Griffin* generally applied to these facts, the present case should not be reversed because Petitioner testified at trial and there is no established law in this context.

In addition, the Petition should be denied because even if this Court reached the constitutional question posed, Petitioner's judgment would nevertheless remain valid. Assuming arguendo that the silence should not have been admitted into evidence under the Fifth Amendment, the error could not have substantively affected the outcome based on Petitioner's subsequent confession, combined with the DNA evidence regarding his father's blood on his clothing, in his shower drain and on the steering wheel of the family truck that he drove. *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

The Petition ought to be denied because statutory authority determines the outcome without reaching the underlying constitutional question. The California courts were not required to extend the *Griffin* rule, Petitioner testified at trial and even if this Court reached the constitutional question, it would be harmless error in view of Petitioner's confession and the blood stains on his truck, clothes and shower drain.

II.

BUSINESS RECORDS WERE SUFFICIENTLY RELIABLE TO SURVIVE A CONFRONTATION CLAUSE CHALLENGE AND CERTIORARI SHOULD BE DENIED

Respondent respectfully submits that the second question presented by this case – whether the person who actually conducted the DNA testing is also the sole witness able to testify regarding its results – is not worthy of review on certiorari. The state appellate court properly determined that the lab director could testify because the business records of the DNA test results had sufficient indicia of reliability to satisfy the confrontation clause under *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

It is an open question whether the Fifth Amendment applies in a non-testimonial circumstance. *See United States v. Hagege*, 437 F.3d 943, 958 (9th Cir. 2006). Nevertheless, this Court does not need to decide this issue. Under *Roberts*, business records are generally considered sufficiently reliable to survive a confrontation clause challenge. *Ohio v. Roberts*, 448 U.S. at 66 n.8; Pet. App. at 3-4. Although *Roberts* was abrogated by *Crawford v. Washington*, 541 U.S. 36, 55-56 (2004), business records are not testimonial hearsay. *Crawford* 541 U.S. at 56. Thus, admission of business records does not